OVERSIGHT OF REGULATORY FLEXIBILITY ACT
(Part 2)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
EXPORT OPPORTUNITIES AND SPECIAL SMALL BUSINESS PROBLEMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

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OVERSIGHT OF REGULATORY FLEXIBILITY ACT
(Part 2)

THURSDAY, APRIL 1, 1982

House of Representatives,
Subcommittee on Export Opportunities and
Special Small Business Problems,
Committee on Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359-A, Rayburn House Office Building, Hon. Andy Ireland (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN IRELAND

Mr. Ireland. Good morning. This morning the subcommittee continues its oversight of the Regulatory Flexibility Act. When earlier this year we drew up our original schedule of oversight hearings, we really didn't envision that we would have to conduct a session like the one we have today.

On March 15, 1982, a hearing was held before the U.S. District Court for the District of Columbia. The hearing concerned a lawsuit filed against the Secretary of Interior, and the Department of Interior over the promulgation of a rule which would increase the filing fee for participation in the Federal onshore noncompetitive oil and gas lease lottery, and increase the annual rents payable by holders of Federal onshore simultaneous oil and gas leases. The lawsuit involved questions concerning the Regulatory Flexibility Act. As a result, the Small Business Administration's Office of Advocacy considered filing an amicus brief in the case. The Friday before the case went to the court, the Chief Counsel for Advocacy, Mr. Frank Swain, decided not to file the brief.

I do not intend to discuss the issues involved in this particular case today. I must admonish the other members and witnesses that I shall have to rule any such line of questioning out of order. The reason is quite simple. The legislative branch should not interfere in an ongoing judicial case. The recent decision in this particular case may or may not be appealed. Therefore, the prudent course is to avoid the particulars of the case. Instead, our two major concerns involve the independence of the Office of Chief Counsel for Advocacy and the proper implementation and enforcement of the Regulatory Flexibility Act.

I've called this hearing to determine the reasons Mr. Swain decided not to file his brief. I also wish to learn of any legal arguments raised by any Federal agencies concerning the requirements of the Regulatory Flexibility Act. As one of the primary authors of the act, this is certainly my duty as well as the duty of all Members of Congress.

Since the President commented on the Regulatory Flexibility Act in his state of small business report, I know, as do all of you, that he supports the act in its proper enforcement. The fact is he even points out there that the Chief Counsel for Advocacy is authorized to appear as an amicus curiae in any action to review a final rule. Likewise, the Vice President has told me more than once that he believes the act is a good piece of legislation and he supports it totally. Both the President and the Vice President are also on record in support of the Chief Counsel of Advocacy and the functions of his office.

I am pleased that the Department of Justice has provided a witness this morning. Apparently, they have had some misgivings about the Advocate's role in the Regulatory Flexibility Act. I hope we can find out what those misgivings are this morning and eliminate any misunderstanding. I am also pleased to have the Department of Interior with us. We have also received a communication from the Office of Management and Budget explaining their role.

Finally, I want to emphasize that our hearing this morning is not a witch hunt. There is a perception in the small business community that the Chief Counsel for Advocacy received a great deal of pressure regarding the decision whether or not to file a brief in this instance. Quite frankly, to a layman, the fact three agencies discussed this case with the Advocate leads one to an inference that at least there was pressure by numbers.

I believe that the Regulatory Flexibility Act, as written, has teeth, and can, and should work. If we have perceived problems with the act, I want to know about them. In addition, as one of the leading proponents of advocacy within the SBA, I want to know about any problems involving the scope or functions of that Office. This, then, is why we are here today.

We will begin by asking the gentleman from Texas if he has any comments.

Mr. STENHOLM. No.

Mr. IRELAND. Our first witness is the Chief Advocate himself, Frank Swain.

TESTIMONY OF FRANK S. SWAIN, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. SWAIN. Thank you, Mr. Chairman. As you know, I have a statement for the record and I would like to summarize it without reciting the whole thing, although I will go into some degree of detail covering our involvement in the issue because that, of course, is the issue before this subcommittee.

First of all, I'd like to state that it is very helpful that this is all on the record because, as you indicated in your opening statement, there is at least a question that has arisen, a question which, in my opinion, will be answered by our clear, honest, and complete laying out of the facts involved in this case.

The *Thompson* v. *Watt* case was, to our knowledge, the first instance in which the Regulatory Flexibility Act would have received a judicial interpretation in the U.S. district court, and it was also the first instance in which the Office of Advocacy had the opportunity to confront some very basic questions of when and how we should be involved in judicial actions.

In general, I can firmly state that this case enforced among officials of the other agencies involved a clear appreciation of the requirements and importance of the Regulatory Flexibility Act but the case has also raised unanticipated legal questions regarding the Chief Counsel's role as an amicus curiae, which I have since taken steps to resolve. In order to clarify the role in future cases seeking review of a rule, I have asked the Justice Department to agree to a statement setting forth the standing and scope of participation of the Chief Counsel.

Of course, I certainly appreciate the interest and support of this subcommittee and in particular I believe that the Regulatory Flexibility Act is an important and effective law. I certainly will continue to do everything I can to make sure that it's effective. This happens to be the first time we've worked with this law in a judicial setting and the context is somewhat different than the administrative setting that we are more normally working in.

As you know, the Regulatory Flexibility Act in Public Law 94-305 gives me a broad mandate to represent the interests of small business in Federal agency policymaking. Let me just state, Mr. Chairman, that there are any number of issues that we find out about every day and every week in which we might take a role—a major role or a minor role—and we have several rough criteria in which we attempt to apply to just determine what sort of role we should take in an individual instance, whether it's a legislative issue, a regulatory issue, administrative issue, a judicial issue, or some sort of policy issue where we are talking with people up here in the Congress, or people in the administration, or independent agencies. I have set forth some of those criteria in my statement.

None of them individually is dispositive, but they do provide a rough guide for my efforts. For example, in the *Thompson* v. *Watt* situation, I found that the plaintiff's attorney already was prepared to argue the Regulatory Flexibility Act points very well in his brief. In addition, before we got into the judicial setting in *Thompson* v. *Watt*, we had very little information from small businesses, trade associations, or Federal agencies which would have enabled us to make any determination of what impact the rule itself would have on small firms.

Let me explicitly describe our experience with the situation. In my office, the Department of the Interior's proposed rule was processed as are all proposed rules by routing it to a professional who, among other duties, reviews all rules proposed by several assigned Federal agencies.

The professional assigned to the Department of Interior received this rule on October 30. After reviewing it, he found it impossible to determine from the notice what small business impact, if any, the rule would have. Early in November on his own initiative, he met with the Department of Interior officials, and voiced his concerns that more information was really necessary to make a determination as to what the impact was on small firms.

He continued to be immediately hampered in his analysis because it was not a field that we were inherently familiar with, and the information was mostly in the hands of the Department of the Interior. His meetings with the Department of Interior officials led him to a belief that the Department of Interior would, in fact, be providing more information, both on small business impact and in the course of a proceeding that they had going with the Office of Management and Budget in which they were asked by OMB to do a full impact analysis of the rule, as a major rule.

On February 17, an attorney for Mr. Thompson, the subsequent plaintiff, called the person on my staff who had met with the Department of Interior in November to inquire about information in our file such as the determination of effects statement prepared by the Interior Department.

The attorney also indicated that his client was considering judicial review of the rule. A week later, hearing no more from the attorney, we called the plaintiff's attorney to see what had been done, and they told us that they had, in fact, filed the lawsuit the day before.

Over the next several days, plaintiff's attorneys discussed the Regulatory Flexibility Act with at least two other members of my staff. Advocacy staff provided them with portions of the legislative history of the act and other information explaining the act's requirements.

Around the end of February, I was informed that there was a case proceeding and that a temporary restraining order hearing had been set for the following week in March. I directed the people on my staff, and specifically Mr. Charles Cadwell, who is the Director of Interagency Affairs, to follow the case and to keep me advised as to context of the case.

I recognized that the filing of the case was the first judicial involvement with the Regulatory Flexibility Act as well as the first potential involvement of the Office of Advocacy's amicus authority. Based on my staff's interpretation that the Interior Department had failed to comply with some of the procedures set out by the act, I asked them that they go ahead and develop that argument or develop the facts that would be involved there.

After the staff worked through the legal arguments, I would be able to decide whether there was an appropriate role for advocacy to take as an amicus in this case.

During the week of March 1, several members of my staff discussed the case with the plaintiff's attorneys primarily to aid the plaintiff's understandings of the Regulatory Flexibility Act but also for us to determine something relating to the plaintiff's qualifications as a small or large business.

On March 3, Judge Green, in a temporary restraining order in camera—which is in her quarters—denied the request or attempt temporary restraining order hearing denied the request for the temporary restraining order and set the March 15 hearing for the preliminary injunction which is the next step in the process.

In order to file a brief, if we were to do so, it is necessary that we continue to develop the legal issues relating to the rulemaking as if a decision had been made as to whether to file or not. So, of course, we continued to develop those issues.

Three attorneys were assigned to the preparation of the arguments, were not involved in any discussions in my office with respect to the policy options available as to whether to file a brief. They were requested to develop any legal arguments that we might be using or that might be relevant.

Late on March 9, Mr. Cadwell telephoned the Justice Department. This was 2 days before the filing deadline in the U.S. District Court. Handling the case to inform them that we were considering filing a brief, he also talked with an Interior Department attorney outlining our concerns for their compliance with the act, and our view of the role of the Regulatory Flexibility Act in a review situation.

At the request of the Interior Department, Mr. Cadwell and another attorney from my staff met with several people at the Interior Department on the following morning. At that meeting, the representatives of Interior and Justice made several assertions involving the merits of the case as well as several assertions involving the role of the Office of Advocacy. We have outlined them in the brief. There are basically three: First of all, that the Office of Advocacy, in light of an executive order in the statute, which dictates that only one agency from the Federal Government executive branch ever appear in court, and that one agency is the Justice Department. In light of that, that we had no authority at all to go into court. Second, their second point was that even if we had authority to go into court, our authority to argue the case was limited by section 612(b) of the Regulatory Flexibility Act which they interpreted to say we had authority to talk about small business impact. In other words, effects that the rule might have on businesses in particular, situations statistics, or economic information of some sort but that we would have no authority to argue about the law and whether the agency complied with the law in a given case.

Finally, the Interior Department suggested they were prepared to make the argument that even if we went into court, that they were going to submit affidavits suggesting that when our monitor met with their staff back in November, that he had, in fact, approved their procedure, and here we were basically Johnny-come-latelies saying it was bad when we hadn't said it was bad before, and that, in fact, we had told them the opposite.

Mr. Cadwell and the other attorney discussed with me, these two issues to our standing, and we spent a lot of time with this particular subject. In the course of trying to hash through the issues as to our standing and the scope of our involvement, I discussed the issues with officials of both the Office of Management and Budget and the Department of Justice and Interior.

My discussions focused on two issues: How best to resolve the question regarding the permissible scope of the Chief Counsel's participation and whether the Interior Department recognized the clean requirements of the act, and was prepared to remedy its procedure in this in future cases.

At no time during these discussions did anyone ask or suggest that I not file a brief based on anything other than their legal reasons that they were giving me. I might add that as an attorney representing the small business community through the Office of Advocacy, I think it is perfectly appropriate for me to discuss any legal issues that come along with other high officials of agencies that I may be in court with or against. It's just a standard course of activity and at least I want to bring my Office into a courtroom. I want to make sure that I have all the facts available that I can, and the best way to do that is to call people on the phone and make sure that we are on the same wavelength or at least we are agreeing to disagree on particular issues.

Let me specifically mention Executive Order 12146 which was what my attention was directed to during the course of these discussions which dictates that certain legal disputes between executive branch officers who serve at the pleasure of the President be submitted to the Attorney General for resolution. Although at one time the Justice Department suggested this meant that for the Interior Department case per se, the *Thompson* v. *Watt* case, that we should go to the Attorney General for resolution, I think that clearly the more appropriate procedure is for me to approach the Attorney General for resolution of our standing and our scope questions for all subsequent cases involving the Regulatory Flexibility Act and, in fact, that is what we have done subsequently.

The Administrator of the SBA, Mr. Sanders, in one of his official acts, and I signed a letter in a memorandum to the Attorney General requesting such an agreement. I am aware of the concern that we had committed ourselves to filing a brief, and subsequently succumbed to some sort of pressure from effective agencies to withdraw from participation.

While the activity of the three attorneys and staff professionals collecting and preparing arguments may have created an expectation on the part of plaintiff's attorneys that we would, in fact, file a brief in this case, Mr. Cadwell had told both of the plaintiff's attorneys that I had not yet decided to appear, that we were actively considering issues.

In effect, to assure that we did not give out mixed signals, on March 8, a full week before the court hearing, I directed that my staff at all contacts with plaintiff's attorneys should be through Mr. Cadwell to make sure that we were speaking all with one voice on this issue.

When the final decision was made, Mr. Cadwell did, in fact, inform the plaintiff's attorneys. On Friday afternoon, March 12, after several days of weighing many factors, I decided this case was not the appropriate one for us to plunge into court, involving the Regulatory Flexibility Act.

There are several reasons that led me to this decision, and I will describe them briefly. Literally, the reasons that you see in the statement, Mr. Chairman, are those that he made lists of what we could gain and what we could lose by entering into this lawsuit, and these are the basic issues that we hashed around.

First of all, and most importantly, this is the first case that's coming up alluding to the Regulatory Flexibility Act.

I, myself, am aware of at least one other case that I think has been filed, and I am sure that there will be many other cases involving the Regulatory Flexibility Act so we want to be extremely careful so we not only analyze this case carefully both for the merits of the case and our role in it, but also that we set the precedent of taking every case on its merits and that the legal community or the Government community wouldn't get the impression that by mentioning regulatory flexibility or small business in their briefs, they are either automatically getting the Office of Advocacy involved in the judicial case, or not.

Second, we didn't have any small business complaints during the pendency of this rulemaking in the fall on this particular rule, and so we had no particular reason to take a special note of it. In the time available, after we learned that the case had been filed, we just didn't have time to educate ourselves concerning what we felt were the key questions of impact on small firms. We just didn't have time to develop the proper factual foundation. If, in fact, we had gotten into the court and the judge said, "Well, you can tell us the facts, but you can't tell us the law," we really wouldn't have had very much to say because we didn't have a big background on the facts in this issue, the facts affecting the effect on small business.

Third, the legal arguments with respect to reviewability were not simple. The Regulatory Flexibility Act relationship to the review provisions of the Administrative Procedure Act is a fairly complicated legal question. In fact, when my staff first started working on it, we had four attorneys working on it, and each of the four had a different opinion as to how the case should be approached and analyzed.

In order to present a brief which adequately addressed the Administrative Procedure Act and its sophisticated interpretation, we needed more time than the preliminary injunction hearing would allow.

The court was on a schedule in this particular case which was highly accelerated over a more normal case where there wouldn't be an application for an injunction. There would be more time for pleadings and responses and setting subsequent hearings.

The case is one of first impression with respect to the Regulatory Flexibility Act and the Advocacy's presence was initially very attractive. As you know, Mr. Chairman, we let several people in the congressional community know that the case was coming up and we were seriously considering getting involved. But the more we thought about it, the less comfortable I was seeking definition of our role as advocate in front of a district judge where there are not normal procedures for amicus curiae. In fact, I might add, there are not any procedures for an amicus appearance in the district court, and it's just not that sort of usual situation.

We were going to go in a court, and the Justice Department and the Interior Department were going to argue that we shouldn't have been in court, or that if we were there, we shouldn't have been saying the things that we were saying. We just didn't feel the way to resolve that issue was to run into court and force the judge to resolve it where she was probably not familiar with some of the background that we are getting into at this point.

On the issue of regulatory flexibility itself, the plaintiff's case was reasonably well drawn, in our opinion, particularly on the key question of reviewability. Our brief would not have added anything particularly new to those arguments.

The Federal defendants were prepared to question the scope of participation granted by section 612 of the act. Again, as I mentioned before, I thought it would not help the plaintiff's case to occupy Judge Green with an extended dispute between a party and an amicus curiae. The Department's objections were not unreasonable given their representation of application Executive orders and the wording of section 612.

Procedures that offered a better resolution of the issue outside of court existed, and let me say when I say they weren't unreasonable, I'm simply saying that on the face of things, they had enough of an objection for a judge to pay some degree of attention to. I'm not at all agreeing with their interpretation of that, though.

Finally, senior officials at all the agencies involved had expressed strong support for the Regulatory Flexibility Act and a commitment to review their overall compliance procedures and to work with us to correct any deficiencies in any cases.

In conclusion, appearances in amicus is one available to me in my efforts to assure implementation of the Regulatory Flexibility Act. It's a tool that the Office of Advocacy must use very carefully to preserve its impact and to present our effectiveness and credibility. The decision in this case was a judgment call to make, and I think that we made the proper judgment call. Given the facts were to filter up again the same way, I don't think we would have done it any differently.

I believe that we can play a greater role in future lawsuits by securing an administrative resolution in a nonadversarial setting of the questions related to the proper role of the Office of Advocacy. Both the Justice Department and the Department of Interior are acutely aware of our presence and our willingness to appear in appropriate cases.

Finally, this proceeding underscores the need to let the small business community know that the Regulatory Flexibility Act provides them the opportunity and the information to influence Federal regulatory actions.

The Regulatory Flexibility Act really is at its best in the regulatory setting, and it is at its best when there are a lot of people concerned about the particular regulation. This is a test that requires the active assistance of all Federal agencies, including the Department of Interior. Your attention to this case and to the Regulatory Flexibility Act is an important indication to Federal agencies and the small business community that the Regulatory Flexibility Act is an essential element of our administrative procedures.

Let me just add one other thing, Mr. Chairman. As you know, and as you suggested in your initial statement, we focused our statement on what we believe were questions relating to the peculiar role of our office in this lawsuit. All during the course of our debate and thought on this case, we also thought strongly about the merits of the case and as you indicated in your opening statement, because the time for appeal is still pending. I don't think it is appropriate for us to discuss the merits of the case, as well, but suffice it to say that those were strong considerations in many regards in our debate on this case, and we looked at them carefully.

Mr. **Ireland**. Thank you very much. For the purpose of setting the record straight, I assume that in none of the discussions you and your office had with other parts of the executive branch, was there no discussion about job position or funding or anything like that? I think that's important.

Mr. SWAIN. No.

Mr. IRELAND. People automatically think that, and so I ask you to comment on that.

Mr. SWAIN. There was no discussion of my job position or anyone else's job position in my office, nor was there discussion of any funding, or any sort of thing with any official involved, and especially any of the officials at the Office of Management and Budget who, I suppose, might expect to make those sorts of arguments.

I think that everybody I and my staff discussed the case with, whether it was at the operation level, or whether it was at the level of decisionmaking officials, recognizes the very important role that the Office of Advocacy plays in monitoring the regulatory process, particularly as it relates to small firms. They all realize that for me to do my job, I'm going to make people mad every once in awhile.

That's something that I realize, and that's something that we are prepared to do when we feel we have good grounds.

Mr. IRELAND. Fine. I think as you have said, and as I said in my opening statement, the two key areas to discuss and the overall position of the Chief Counsel of Advocacy, the ability of the Counsel of Advocacy to step into court cases where he believes, it is important to uphold the duty of being the advocate of small business.

You referred to an Executive order that says only the Justice Department can represent the Government in a case. However, it is the clear intent of the law which we passed that the Office of Advocacy could step up and enter it when they think that it is necessary to do so.

It would appear to a layman, there is just a bit of a conflict here. It would appear many in the Justice Department are saying, "Hey, you know, the law is the law, but if we want to have an Executive order that we, in the Justice Department, can do so and so, the Executive order supercedes the law."

I think that's where the line is drawn and, of course, this is the thing that the small business community and we as Members of Congress want straightened out.

Clearly, we are on record with our view. And in the letter that I will put in the record from the Vice President. It is clearly his view. That is what the Office of Advocacy is supposed to be doing, following the law, and the law says that you can step in there Executive order or no Executive order. Now, I assume that you feel the same.

Mr. SWAIN. Yes, sir, no questions.

Mr. IRELAND. Since you must have correspondence with the Justice Department concerning this, I would request that we put a copy of that into the record.

Mr. SWAIN. Yes, sir, I have one this morning, and I will give it to you.

Mr. IRELAND. Very good. I think that is an important part of what we are doing. Also, without objection, your statement will be entered in its entirety into the record.

[Mr. Swain's prepared statement follows:]

PREPARED STATEMENT OF FRANK S. SWAIN, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

I welcome this opportunity to discuss the Regulatory Flexibility Act, and in particular the role of the Office of Advocacy in judicial review of a regulation. The case *Thompson* v. *Watt*, recently heard in U.S. District Court in Washington, was the first instance in which the administrative process called for by the Regulatory Flexibility Act was at issue before a court, and likewise it was the first instance in which the Office of Advocacy had the opportunity to confront some very basic questions of when and how we should be involved in judicial actions.

In general, I can firmly state that this case enforced among officials at the Department of Interior and Justice and at the Office of Management and Budget a clear appreciation of the requirements and importance of the Regulatory Flexibility Act. But this case has also raised unanticipated legal questions regarding the Chief Counsel's role as an amicus curiae, which I have since taken steps to resolve. In order to clarify our role in future cases seeking review of a rule I have asked the Justice Department to agree to a statement setting forth the standing and scope of participation of the Chief Counsel.

I am also appreciative of the interest and support of this committee as it painstakingly reviews the implementation of the Regulatory Flexibility Act. Awareness of the Congress sustained interest in the Act will greatly enhance my ability to convince other agencies that we are serious about the importance of the impact of Federal regulations on small business. As you well know, much of my role of Chief Counsel is to persuade Federal regulators to consider factors that they have traditionally overlooked when drafting proposed rules. Your involvement makes my job easier.

As you know, the Regulatory Flexibility Act and Public Law 94-305 give me a broad mandate to represent the interests of small business in Federal agency policymaking. The law does not establish criteria for me to use in deciding when and how to use the legal and political tools available to me. Rather, it is left to the Chief Counsel's judgment how best to accomplish the clear overall goal: to assure that small business gets a fair shake from Federal policymakers.

I have several rough criteria I weigh before I get involved in any issue in any forum. I would like to describe them briefly because they provide a framework for a discussion of *Thompson* v. *Watt*.

Before I decide to devote staff time, research money, my time or the prestige of my position to advocacy on a particular issue, questions to explore include:

1. How many small businesses are involved?
2. How much are they affected?
3. Is the policy issue involved precedential or likely to affect more than the immediately concerned small business?
4. As a matter of policy or law, how strong is the small business complaint?
5. How adequately is the issue presented by other parties?
6. What resources are available to me to address the issue?
7. What forum will best allow me to achieve a favorable result for small business?

While none of these criteria is dispositive, they do provide a rough guide for my efforts. For example in *Thompson* v. *Watt* I found that the plaintiff's attorneys had argued the Regulatory Flexibility Act points very well in their brief. In addition, we had little other information from small businesses, trade associations, and the Department of Interior upon which to make a determination that the rule itself would cause significant harm to small business.

In my office the Department of Interior's proposed rule was processed, as are all proposed rules, by routing it to a professional who, among other duties, reviews all rules proposed by several assigned Federal agencies. The professional assigned to the Department of Interior received this rule on October 30, the day after if was published. After reviewing it he found it impossible to determine from the notice what small business impact, if any, the rule would have. Early in November he called the agency contact, attended a meeting with Interior officials, voiced his concerns, requestd a copy of their internal "determinations of effects" statement and noted in his file that the certification was inadequate and that the agency officials had been notified. He continued to be hampered by a lack of specific information on which to make a firm determination of small business impact, although he had the impression from his discussions with Interior officials that more information would be forthcoming.

On February 17 an attorney for Mr. Thompson called the monitor on my staff to inquire about information in our file like the determination of effects prepared by the Department. The attorney also indicated that his client was considering judicial review of the rule. A week later the Advocacy professional called plaintiff's attorney to see what they had done with the rule. He learned that they had in fact filed suit the day before.

Over the next several days, the plaintiff's attorneys discussed the Regulatory Flexibility Act with at least two other members of my staff. Advocacy staff provided them with portions of the legislative history of the Act and other information explaining the Act's requirements.

About February 26 I was informed that a case raising the Regulatory Flexibility Act had been filed and that a temporary restraining order hearing had been set for the following Tuesday. I directed the director of Interagency Affairs Division of my office, Charles Cadwell, to review the plaintiff's Regulatory Flexibility Act case and let me know the results of the temporary restraining order hearing.

I recognized that the filing of the case was the first judicial involvement with the Regulatory Flexibility Act, as well as the first case in which Advocacy's amicus authority might be used. Based on my staff's impression that the Department of Interior had failed to comply with the procedures set out by the Act, I asked that they develop the arguments more fully so that I could make an informed decision about my participation. After the staff worked through the legal arguments I would be able to decide whether there was an appropriate role for Advocacy to take as an amicus in this case.

During the week of March 1, several members of may staff discussed the case with the plaintiff's attorneys, primarily to aid their understanding of the RFA, but also to seek information about the size of Mr. Thompson's company and more general questions of small firm impact. On March 3, Judge Green denied the request for a temporary restraining order and set the March 15 hearing date for the preliminary injuction hearing.

In order to file a brief, if we were to do so, it was necessary that the Advocacy staff continue to develop the legal issues relating to the rulemaking as if the decision had been made. The three attorneys assigned to the preparation of the argument were not involved in the discussions in my office with respect to the policy options available to me. Their instructions were to have a brief ready to file.

Late on March 9, Mr. Cadwell telephoned the Justice Department attorney handling the case to inform him that we were considering filing a brief. He also talked with an Interior Department attorney, outlining our concerns with their compliance with the Act and our view of the role of the Regulatory Flexibility Act in a review situation. At the request of the Interior Department, Mr. Cadwell and another attorney from my staff met with several people at the Interior Department on Wednesday morning. At the meeting, the representatives of the Interior and Justice Departments made several assertions with respect to the role of the Office of Advocacy.

1. The Justice Department referred to an Executive order and a statute designating the Attorney General as the sole legal representative of the Government.

2. The Justice Department's attorney indicated an intent to seek to confine our participation to a discussion of the effects of the rule on small firms, not legal issues. This was based on his narrow reading of section 612(b).

3. The Interior Department indicated that they believed that the Office of Advocacy Regulatory Flexibility Act monitor had approved their initial certification at the meeting in November. They were prepared to submit affidavits to that effect.

The meeting ended without agreement. I was briefed shortly thereafter.

I discussed the two issues with respect to our standing with my staff and also with officials at the Office of Management and Budget, and the Departments of Justice and Interior. My discussions focused on two issues: How best to resolve the question regarding the permissible scope of the Chief Counsel's participation, and whether the Interior Department recognized the clear requirements of the Act, and was prepared to remedy its procedures in this and future cases. At no time did anyone ask me or direct me not to file a brief in the case.

Executive Order 12146 directs that certain legal disputes between executive branch officers who serve at the pleasure of the President be submitted to the Attorney General for resolution. I decided that the Administrator of SBA and I should submit a proposed memorandum of understanding to the Justice Department seeking to clarify these issues. Earlier this week, we sent the proposed memorandum to the Justice Department.

I am aware of concern that we had committed ourselves to filing a brief and subsequently succumbed to pressure from the affected agencies to withdraw from participation. While the activity of the three attorneys and staff professional collecting and preparing arguments may have created an expectation on the part of plaintiff's attorneys that we would in fact file a brief in this case, Mr. Cadwell had told both of plaintiff's attorneys that I had not yet decided to appear, but that we were actively considering the issue. To assure that we did not give out mixed signals, on March 8 I directed my staff that all outside contacts with respect to this case be handled by Mr. Cadwell. When the final decision was made, he informed plaintiff's counsel.

On Friday afternoon, March 12, after several days of weighing many factors, I decided that this case was not the right one for my first amicus appearance under the Regulatory Flexibility Act. There were several reasons that led me to this decision, and I will describe them briefly:

1. I recognized that it was impossible for me to appear as an amicus curiae in every proceeding which alleges a violation of the Regulatory Flexibility Act. Each case would have to be approached on its merits.

2. We had no small business complaints with respect to the rule, aside from the call from plaintiff's attorney in February after the final rule was issued. In the time available we had little ability to develop the necessary factual foundation to properly assess the total impact on small businesses involved.

3. The legal arguments with respect to reviewability were not simple: the Act's relationship to the review provisions of the Administrative Procedure Act is a complex legal question. In order to present a brief which adequately addressed the Administrative Procedure Act and its sophisticated interpretation, we needed more time than the preliminary injunction hearing would allow.

4. The case was one of first impression with respect to the Regulatory Flexibility Act and Advocacy's presence was initially attractive. However, I was not comfortable seeking definition of our role in a district court where no procedures for amicus curiae exist. It was important that we not force a ruling from this court which could have restricted the scope of our participation in future cases.

5. The plaintiff's case was well drawn, particularly on the question of reviewability. Our brief would have been largely cumulative.

6. The Federal defendants were prepared to question the scope of participation granted by section 612 of the Act. I felt it would not help the plaintiff's case to occupy Judge Green with an extended dispute between a party and an amicus curiae. The Department's objections were not unreasonable given their representation of applicable executive orders and the wording of section 612. Procedures that offered a better resoluton of the issue, outside of court, existed.

7. Senior officials at all the agencies involved had expressed strong support for the Regulatory Flexibility Act and a commitment to review their overall compliance deficiencies.

In conclusion, appearance as an amicus is one tool available to me in my efforts to assure implementation of the Regulatory Flexibility Act. It is a tool I want to use carefully, to preserve its impact and my own credibility. My decision in the *Thompson* v. *Watt* case was a judgment call for me to make. Given the potential confusion with respect to our role, there did not seem to be much to gain either for the plantiff or for the Regulatory Flexibility Act by an appearance in this case. I believe that I can play a greater role in future law suits by securing an administrative resolution in a nonadversarial setting of the questions related to that role. Both the Department of Justice and the Department of Interior are acutely aware of our presence and our willingness to appear in appropriate cases.

Finally this proceeding underscores the need to let the small business community know that the Regulatory Flexibility Act provides them the opportunity and the information to influence Federal regulatory actions. This is a task that requires the active assistance of all Federal agencies, including the Department of Interior. Your attention to this case and to the Regulatory Flexibility Act is an important indication to Federal agencies and the small business community that the Regulatory Flexibility Act is an essential element of our administrative procedures.

Mr. **Ireland**. Would you comment any further or elaborate any further about where the status of that correspondence is? When do you expect to have it resolved? Because as you said, the purpose is to get this straightened out for all cases, and not just one case.

Mr. **Swain**. Well, the status of the letter is that it was signed by the administrator, Mr. Sanders and myself, on Tuesday or on Monday—I cannot recall which—and hand delivered that very same day to the Justice Department.

I am sure that the Justice Department has not made any final decision on it in the intervening 2 days. We did clearly state in the letter that we were very interested in securing a very early decision on this so that our hands would not be tied to this issue. You know, when the next issue on regulatory flexibility comes along that we have to confront it.

The exact timeframe that the Justice Department may take, I could not predict. I am sure that they are interested in an early resolution, too, because it is an important regulatory issue.

Mr. **Ireland**. In approaching another case, assuming the favorable resolution of the memorandum we just talked about, would you approach a case and consider filing a brief in a different way than you have in the past?

Mr. **Swain**. Well, as I indicated in my statement, there are two questions. One is whether we can go in the court at all or not, and I think that the legislative history and the statute is very plain on that, as you've just indicated. So I really don't think there is very much of a question at all that we have a proper role of going into court. The second question is really the question that has to be answered, and that is when we go into court, what can we say?

Now, the Justice Department objected to our participation for saying anything on the law. They said, "We are the people who are charged by the President with interpreting the law, and presenting the legal situation vis-a-vis the Federal Government's involvement in any dispute. However, since you are an expert in small business, you can come in and talk about small business impact."

So, for instance, in this particular case, if we had some information relating to the numbers of small firms involved or the impact that it would have on small firms, the Justice Department probably or that the court probably would not have a strong objection to that under the reading that was taken by Justice, but they might have a very strong objection for us to come in and say, "Well, apart from how it affects small business, you didn't do a very good job, and you didn't comply with the rule by making the analysis," because then we are attacking the legal behavior and the legal process of the rulemaking.

Let me state that in cases where we have had a heavy involvement in the rulemaking, it will be a much simpler decision for us to determine whether we have anything to contribute in front of a court. There are many cases in which we filed extensive comments and which we have done studies on our own to try and inform agencies of what's going on and in those cases we have some very unique factual information to present.

The key question is, in cases where we haven't had an extensive involvement in the rulemaking—and there are many regulations that we haven't—we are still dealing at the rate of something like 350 regulations a month. My 19 professionals cover those pretty darn well, but we necessarily have to pick and choose on what we get deeply involved in, and there may well be a case that comes up that we haven't not been involved deeply in and in the rulemaking phase of it, and it may present an important question for regulatory flexibility at the judicial stage. Whether we should go into that case or not to a large degree depends on how we can resolve administratively this issue of involving the scope of our ability to talk in front of a court.

Mr. **Ireland**. I appreciate those comments, and obviously, if the Congress had wanted the Advocate only to be able to discuss the effects and not the legal issues, we would have written the law differently.

Mr. Swain. Well, in fact, that's the very point that I make to the Justice Department in our memorandum: That if you are going to take such a narrow reading that the Advocate can only discuss the facts, then in effect that's bequeathing that Office of Advocacy with the power and responsibility and authority, which I don't think the Congress intended, and that's setting us up as some sort of special master for regulatory proceedings.

I don't think that's what Congress intended, and I don't think that that's congruent with legislative history or with the statute.

Mr. Ireland. Let me say in further support of that, that anyone in any branch of the Government—Justice or any of the other agencies—who for one minute thinks that the small business community and those of us that feel strongly about it in the Congress, think that you can't file, they have a very clear signal from me that they are going to hear from us in support of your filing.

The niceties of the legal world that the people live in up here mean nothing to the businessman out on the street. If most businessmen out in America could have heard your statement that there were four different opinions in your legal office alone as to what something might mean, they would be appalled. They just have had all they can take of the crossing of t's and dotting of i's and posturing and such that goes on in the Federal regulatory area.

I would encourage you to step up and do it when you think it is appropriate.

Mr. Swain. I couldn't agree more, Mr. Chairman, and let me just expand upon that for a moment. The Regulatory Flexibility Act places the burden of compliance on the agency. It's a self-help act, and it is not a very complicated law, and it doesn't require anything very complicated. It requires agencies to think twice about what they are doing and put down on the record how what they are doing impacts on small firms, and whether it is possible to change that at all. It does not set up the Office of Advocacy or any other agency in the Federal Government to check that off every time. It really puts the responsibility on the regulatory agency to cure its own situation.

I'm distressed; I'm discouraged to some degree that we've gotten hung up on what you regard as the legal nicety, and which it is, in fact, a legal complication that, frankly, we didn't anticipate.

If we had anticipated it, I would have been certain to have gotten this straightened out ahead of time. I believe very firmly in the Regulatory Flexibility Act in making sure that if it's a strong law, whether it is a strong law in the context of an administrative proceeding or in the context of a judicial proceeding and the small business community can be very confident that I'm going to use any opportunity that I have to make sure that that's the case.

Mr. Ireland. I think your memorandum to the Justice Department is the right step in the right direction, and I think your comment that the Advocate can appear in court to review the final rule, whether or not he's commented previously, is another loud signal that needs to be heard throughout the community.

I would like to say, I think you are working in the right direction.

I will put in the record at this point a letter from the Vice President describing his interest in this.

[The letter from Vice President George Bush referred to above follows:]

THE VICE PRESIDENT,
Washington, D.C., Apr. 1, 1982.

Hon. ANDY IRELAND,
Chairman, Subcommittee on Export Opportunities and Small Business Problems, House Committee on Small Business, Washington, D.C.

DEAR ANDY: I very much enjoyed the chance to talk to you this week about small business regulatory relief.

As you know, the Presidential Task Force on Regulatory Relief has made regulatory relief for small businesses one of our top priorities. At a press briefing in early February on this subject, President Reagan stressed the importance of small businesses to our country's economy and to the regulatory relief effort. The Regulatory Flexibility Act is an integral part of that effort, and the task force, in cooperation with the Small Business Administration, will use that law to its fullest to aid small businesses.

Sincerely,

GEORGE BUSH.

Mr. IRELAND. I think the small business community can be pleased that you are working in the right direction, in a thoughtful way, and I think that the other agencies can be pleased too, at the way you are conducting yourself moving in this direction.

You have strong support in this committee, and in this Congress and at the highest levels of the administration and we are pleased with your remarks, your answers, and your forthrightness.

Mr. SWAIN. Thank you, Mr. Chairman.

Mr. IRELAND. Thank you. Our next witness is Mr. Regnery, Deputy Assistant Attorney General, Land and Natural Resources Division of the Department of Justice.

TESTIMONY OF ALFRED REGNERY, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Mr. REGNERY. Thank you very much, Mr. Chairman. I am very happy to be here.

Let me say before I read my statement that, in view of the conversation between you and Mr. Swain, we at the Justice Department, at least those of us who represent the administration at the Justice Department—and I think the entire Justice Department as well—are just as committed as anybody else in trying to solve the bureaucratic and regulatory mess that exists in this country. I think that is, among other things, the mandate we had from the 1980 election, and we are doing everything we can to try to straighten that out.

On the other hand, the Justice Department does appear in court for other agencies of the Government, primarily, and we do view that role of ours with jealousy. I guess we don't like to have other agencies and departments of the Government taking positions other than ours because we don't think that where that happens, it really helps to straighten out the problems that small businessmen, and big businessmen, also, have.

It doesn't really do anybody any good. Really, to have three or four or even two different positions of the Government represented in court, and, therefore, where we can, we try to straighten these things out beforehand.

As far as the role of the Small Business Administration goes in filing amicus briefs, obviously that does present something of a problem. I'm not going to try to tell you what I think ought to be done because it is a difficult legal issue. It will have to be resolved over a period of time both within the Department of Justice and other places within the executive branch.

I am Alfred S. Regnery, Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice. I am here to discuss the participation of the Department of Justice in the chronology of events leading to the SBA's decision to forego filing an amicus curiae brief in the case of *Stephen Thompson* v. *James Watt*.

As you know, this matter is still in litigation and therefore, I am unable to discuss anything that would affect the merits of the case. I will be happy to outline for you our involvement in this matter to the extent that I can.

Mr. William Hill, an attorney in the General Litigation Section of the Lands Division, was to file a brief in opposition to a motion for preliminary injunction in the above-mentioned case on behalf of the Department of Interior on March 12, 1982. On the afternoon of March 10, Mr. Hill received a call from Charles Cadwell of the Office of Assistant Chief Counsel for the Advocacy of the SBA, advising Mr. Hill that SBA was considering appearing in the case as amicus curiae in support of the plaintiff. Mr. Hill was surprised by this development since SBA had not mentioned it to the Department of Interior prior to this, nor had it made formal comments during the rulemaking proceeding. A meeting was called for the next day at the Interior with officials from the SBA, Department of Justice, and Interior attending. Mr. Hill and William Cohen, Assistant Section Chief for the General Litigation Section, attended for the Department of Justice.

The Department's representatives argued at the meeting that the SBA should not file an amicus brief because it had not formally participated in the rulemaking process. Since the case should be heard on the administrative record and SBA's views did not appear in that record, it would not be good administrative practice to raise problems for the first time in litigation.

I called officials later that same day at both the SBA and Interior to ascertain what the final decision was to be. I also expressed my concern over the lack of consultation between the agencies, and the fact that SBA and Interior might appear on opposite sides of the case. Finally, I called the Office of Policy Development at the White House to advise them of the situation.

On Friday, March 12, Mr. Hill had several additional conversations with SBA officials and either relayed those comments to the Interior Department himself or suggested that direct contact should be made between the two agencies. Near the end of the day, we learned from Interior that SBA had decided not to appear. I would be happy to answer any questions that I can, given the pendency of the litigation.

Mr. **Ireland**. I understand very clearly you are not here to, and are not in a position, to give us the Justice's answer on that. On the other hand, and at the same time I will underscore that I appreciate and I know of the sincerity of not only you but the others in getting rid of excessive regulatory activity.

I want you to know that I am concerned, that in this instance, the law clearly says one thing. It is not subject to being thrown out the window by an Executive order.

Despite your sincerity, that's what the law says. I would admonish you to take this clear signal back to those who will be looking over the memorandum they have received from the Administrator and the Advocate that we're sincere about this also. We think it is one of the ways that this law is going to work. The Vice President and, the President of the United States in his statement on the State of Small Business says so.

Do not let the jealous guarding of turf by people in the Justice Department at any level, whether they've been here 1 or 5 , or 10 years—do not let that jealous guarding of turf get in the way of doing what this law says.

In fairness to you, again, I'm not going to ask you to comment on how you're going to refer to the memorandum, but I want you to know that we are going to be sitting on the edge of our chair, and so is the small business community across the Nation, waiting for that reply. I trust that it will be one that, without question, complies with the law as indicated. It's not a hostile statement. It is a statement of the American people brought about by the very gobbledygook regulations that you sincerely say—and I do believe sincerely say—you're trying to get rid of. So let's proceed with this act.

Mr. **Regnery**. Well, I will certainly take that message back to the Department, Mr. Chairman.

Mr. **Ireland**. Thank you. Let me ask you again about your statement that, for some reason because the SBA views did not appear in the record, that it would not be good administrative practice to raise problems for the first time in litigation. I take strong exception to that, and perhaps you could defend that.

The image that you portray or what the Justice Department portrays as what is good administrative practice, small business could care less about. These guys don't care about that, and I don't think that the Congress cares about that. Now, having made that statement, how do you respond?

Mr. **Regnery**. I guess simply by the fact that since there was a rulemaking procedure that went on at the Interior Department which followed the dictates of the Administrative Procedure Act, we felt that if the SBA was concerned about small business matters in that rulemaking proceeding, if they had things to say, that they should have been said at the rulemaking level so that they could have been taken care of there. That like any other thing that follows a set of rules, if you can work the problems out well ahead of time before you get to the final crunch, I think it makes it a lot easier for everybody and probably serves to get the concerns taken care of sooner rather than at the last minute. I guess quite simply, that's the concern that I had.

Mr. **Ireland**. I would say that what you said is that it makes it a lot easier for everybody.

Mr. **Regnery**. What I mean by that is, it doesn't make our job easier. It makes it easier to get Small Business Administration concerns in this case into the rule.

Mr. **Ireland**. If you will stop for a minute and reflect on what I've said and others have said in the Congress the very regulation that you want to get rid of and the redtape are the very reasons that you might not hear about this thing right up until the last minute.

We have run the poor small businessman out of participating in his Government because we've got so many people hanging around, trying to make it easier for everybody by procedures that they never hear about. If they could hear about these things and know what was going on here, you would have a whole lot more of them up here if it wasn't so costly for them to participate.

Mr. **Regnery**. Well, that's true, but, of course, SBA was involved in this process back in the fall. I don't remember what Mr. Swain said was the first date they were involved but it seems to me it was October or November. We first learned of their concern the day before the brief was to be filed.

Mr. **Ireland**. The only thing that is injured by being in there late is the convenience of some bureaucratic lawyers. I don't want to see this Advocate or anyone in the future precluded from going in at the last minute.

So let's take that monkey off the back of the Advocate and put it where it belongs. It belongs on the back of the agencies who, for their own good reasons drag their heels, don't do it, don't take the time to understand, don't understand what their activities are doing to the small businessman in America. We want the Advocate of Small Business to be able to go in one-tenth of 1 second before if necessary because that's the whole purpose of having an Advocate. OK?

Mr. **Regnery**. I understand that, and I guess all I want to say in response is that as lawyers, we appreciate, I think, that we have a set of rules that we have to play by. I think we are trying to do a consistent job of playing by those rules to make it as fair as we can for everybody.

I think that in our role in urging the Advocate not to file this brief in this case, we were being consistent in that regard from the standpoint of urging them to, in the future, let us know as soon as they can, and I don't know what went on between SBA and Interior. I certainly wasn't involved in that; Interior can speak to that when they testify.

We're not trying to make anybody's job easier. Don't misunderstand me, certainly not our bureaucratic job. What we are trying to do is if there are concerns that SBA has in a case like this regarding small business, if we know about them or if Interior knows about them, I should say, way up front rather than at the last minute, that certainly affords the opportunity to take——

Mr. **Ireland**. I quite agree. It would be nice. What I'm saying is you say we lawyers have our rules. We are sick and tired of that. Now, there is a time limit in court when things can no longer go in. Yes nice little rules that make it pleasant for bureaucratic lawyers to operate are of no interest to the American community. Small business wants its Advocate to be able to go in there when he finds something.

In fact, as you and I both, I think, agreed in our dialog here, the very fact that it might be the last minute is a function of two things. It is a function of the mish-mash operation in agencies that don't sincerely go by regulatory flexibility, and it's a function of the very thing that you and I are both trying to get rid of, the overregulation of a sizeable community, the small business communitv in this Nation.

So I would ask that you carry that message back.

Mr. REGNERY. Well, I certainly will. We are trying to serve the Nation, I guess, and we are trying to do that the best way that we can and, obviously, we will do everything we can to try and straighten out this problem, and to come up with a solution that is workable as far as the SBA is concerned, as well.

Mr. IRELAND. I have no further questions. Thank you.

Mr. STENHOLM. My first comment would be to just say "Amen" to what the chairman just said. I accept your sincerity in everything that you've said today, Mr. Regnery. But I think the point I would make is just as I received a complimentary call from a little old lady last year, she nonetheless said, "Congressman, no matter how good a job you think you're doing up there, it ain't good enough."

I think that's the basic message that the chairman has said, and since we are precluded from discussing the merits of the case and what we're here today to talk about in generality, I would want to make one point that just underlines the difficulty and where you say that the Justice Department is just as interested in solving the bureaucratic mess, as you are. I've got one example in the Civil Rights Division of your office right now that just disproves it.

I have a large city in my district that has been asking for a rule, a regulation, or an authority to hold an election, or two elections; has been asking for 6 months to hold that election legally. They've already had to hold one, and still don't have an answer. We have a city election coming up this Saturday, and we still cannot get an answer from the Civil Rights Division of the Justice Department. I cannot get an answer.

I had people come up from this town and appear before representatives of the Civil Rights Division, and they were appalled at the ignorance expressed by those representatives. I don't mean you. I'm telling you to take back——

Mr. REGNERY. I'll try to be a good messenger.

Mr. IRELAND. We will furnish briefcases to carry this home.

Mr. REGNERY. We've got too many of those at the Justice Department already.

Mr. STENHOLM. But the point is, the due process, the whole process of the legalese that has just multiplied in this town. The small businessmen, and quite frankly, the people are just getting fed up with it. I'm not a lawyer. I'm a farmer, a schoolteacher by trade, and I don't understand why we can't get timely answers.

Another example which I think is building on us that's going to just overwhelm us sooner or later is: A man attempts to take the life of the President of the United States, and 1 year later still has not been brought to trial because of what Mr. Chairman was talking about, in this case of small business advocacy, and we can't get a ruling.

Once again, our city is going to have to hold an election, and if you come in next week and say, "Well, you didn't do it right. We never gave you the authority to do it." What are the people of the 17th District of Texas going to talk about? I hope maybe you can plug into somebody down there, and ask them to please call us and tell us, can we hold the election on Saturday or can we not?

Mr. REGNERY. Well, I will call the Civil Rights Division and tell them that. I'm sure we could carry on all day about this, and I think I am very much aware of the problem that you discuss.

Philosophically, whether it's the Justice Department's fault, or Congress fault, or the Courts' fault, I don't know. It's probably a combination of all of them. I certainly agree with you that things could be much more streamlined and so on for the constituents of your district and every other, than they are. Washington has a tendency to make things a great deal more complex than they need to be.

Mr. STENHOLM. Well, I'll accept my 1/435th share of the blame, and I think that's what we're here about. In fact, I'd give an extra help to the chairman for whatever part of the blame that he has.

Mr. IRELAND. That's right. There's plenty of it to go around. Your candor and the way you have conducted yourself is outstanding, and I think your views are clear. In our discussion about the Advocate entering at any point in the proceedings, you're not aware of any legal citation anywhere that says that they can't do that, are you?

Mr. REGNERY. No.

Mr. IRELAND. That's good.

Mr. REGNERY. I mean, there may be one, but if there is we don't know———

Mr. IRELAND. Well, I hadn't heard of anybody that did.

I thought maybe somebody had discovered a wheel that we didn't know about. We thank you very much for an excellent dialog.

Mr. REGNERY. Thank you.

Mr. IRELAND. We appreciate it. Thank you. Our next witness is Mr. William Bettenberg from the Department of the Interior. He is Deputy Assistant Secretary for Policy, Budget and Administration.

If you would, introduce those that would be appearing with you and, again, I stress we need to stay out of the case itself, and with that introduction, proceed.

TESTIMONY OF WILLIAM BETTENBERG, DEPUTY ASSISTANT SECRETARY FOR POLICY, BUDGET AND ADMINISTRATION, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY WILLIAM SATTERFIELD, ASSOCIATE SOLICITOR, DIVISION OF GENERAL LAW; JOHN TREZISE, ASSISTANT SOLICITOR FOR ADMINISTRATIVE LAW AND GENERAL LEGAL SERVICES; AND DR. ABRAHAM HASPEL, ECONOMIST, OFFICE OF POLICY ANALYSIS, DOI

Mr. BETTENBERG. Yes, Mr. Chairman. I am William Bettenberg, Deputy Assistant Secretary for Policy, Budget and Administration in the Department of the Interior. I have with me Mr. William Satterfield, who is Associate Solicitor for the Division of General Law in the Department of the Interior; Mr. John Trezise, who is the Assistant Solicitor for Administrative Law and General Legal Services. Over here on the far right is Dr. Abraham Haspel who is an economist in the Office of Policy Analysis.

I had been prepared to discuss our reasoning in the development of the rule that's involved and a few of our concerns with the *Thompson* v. *Watt* case, but in light of your concerns, I will amend my statement to eliminate that portion.

At the outset, I wish to state that Secretary Watt is very much concerned about the impact of Federal regulation on small business. In the past year, we have undertaken a comprehensive review of the Department's rules to eliminate unneeded regulations and to assure that those regulations that are needed impose only the minimum burden necessary to accomplish their purpose.

In this process, we have been sensitive to the problems of small business and have attempted to accommodate these problems. I might add to my prepared remarks that it is our strong view that regulations of almost any sort have a disproportionate impact on small businesses.

The Regulatory Flexibility Act has been an integral part of our regulatory reform process. Our written procedures governing rulemaking specifically incorporate the requirements of the Regulatory Reform Act, and we have worked to sensitize our personnel who actually write rules to the act. In testimony before your subcommittee last October, Chief Counsel for Advocacy Swain praised these efforts and stated, "The Department of Interior's performance under the Regulatory Flexibility Act has been exemplary in virtually every respect."

We are currently in the process of updating our basic guidance on the preparation of Federal Register documents, and the requirements of the Regulatory Flexibility Act are prominently displayed in that guidance. This is simply the latest piece of guidance that we have for the department, and to indicate that it's a weighty matter, I brought a copy with me. As you can see from all the attached clips, these are all points within our "cookbook", on developing regulations where we emphasize the Regulatory Flexibility Act.

Our procedures automatically call for the development of a "Determination of Effects" to address the Regulatory Flexibility Act and the impacts on small business. Our procedures also call for the prompt submission of a copy of that determination to the Chief Counsel for Advocacy for the Small Business Administration.

Regarding our concern with the Chief Counsel's entrance into the *Thompson* v. *Watt* case, I've heard your comments with respect to the timing and the point at which the Advocate should be able to enter cases. However, we were definitely concerned by what we considered to be the late appearance of the Chief Counsel in the case, which was 2 days before the Government's brief was due to be filed, and 8 days after the temporary restraining order had been denied by Judge Green.

Prior to March 10, we had no indication that the Chief Counsel had problems with the development of the filing fee rule. As indicated in Mr. Swain's testimony last October, our Department has been very cooperative with the Chief Counsel's Office and, had the office approached us during the development of the rule, we would have been responsive to its concerns.

In fact, a copy of the Determination of Effects dealing with the matter was sent to the Small Business Administration, a member of the Chief Counsel's staff met with representatives of both the Bureau of Land Management and my office on November 9, 1981, to discuss the filing fee rule. Dr. Haspel, who participated in that meeting, is here with me today. It was our understanding as a result of that meeting that the Chief Counsel's representative had no problems with our compliance with the Regulatory Flexibility Act developing the rule, and as a result, we would not hear any more from the SBA regarding the rulemaking.

This was borne out by events, since we heard nothing more from the SBA during the rulemaking process which was completed on January 20. I might add that from a procedural standpoint, an additional concern that we had that was very real to us was that if the plaintiff were to prevail, we would have had quite a bureaucratic nightmare regarding the filing period which was proceeding at that time. The best example, I think of that, is that we had a filing that was interrupted several years ago, and as a result of that filing disruption, we still have some $2 million in filing fees that have not been claimed by the public out of a total exposure during that filing period of about $7 million. I would submit that probably all of that $2 million, which would represent about 200,000 filings, would be from small investors and small businesses. Consequently, it is very disruptive from the public's standpoint.

I think that concludes my remarks. We thought we had proposed a good rule, done it properly, and adequately considered comments received. Beyond that, I can say that we do think that we have a good record in dealing with small businesses. We will continue to maintain that good record and continue to cooperate with the Chief Counsel for Advocacy. That concludes my formal remarks.

Mr. IRELAND. Thank you. At the outset, I can't let go by your statement where the blame lies. It is not a function of administrations. It is a function of what's in our bureaucracy, and that is placing the blame for a bureaucratic nightmare on some activity that came later. I venture to say that in the case that you cited, if things had been done right at the outset, you wouldn't have had a bureaucratic nightmare. As far as the Advocate stepping in, I don't want any agency—yours or any other—if the Advocate comes in the last second of the operation and says, "this shouldn't be," I don't want to hear, and the American public doesn't want to hear, that a bureaucratic nightmare was caused by the Advocate doing that.

The bureaucratic nightmare is caused by the bureaucratic activity up to that point. We too often hear, "Hey, we can't make a change," routine simply because it would cause a bureaucratic nightmare. Generally speaking, it is because it has been improperly done at the outset. Now, as you can tell, I disagree very strongly with any inference from any agency that the advocate can't come in at any time.

I don't want any agency sailing under the guise and the thought that if they haven't heard from the Department of Advocacy, that is approval. It just isn't, and it won't be, and we don't expect it to be. As the gentleman from the Justice Department said, he doesn't know of any law which says they can't come in at the last minute, so let's just clear that up right now. I think it is nice to say you have an interest in small business, and I sincerely believe that in the Interior Department, there is an interest in small business. But it's not up to you to judge whether you have a good record.

We wouldn't be talking about these things if we all had a good record so let's not do that. We've had a poor small business record in American Government. We've got to make some improvements. Now, the point of regulatory flexibility is if it is done properly, then there won't be any need for the advocate to appear.

Also, the advocate can come up at any stage and say what he wants. Don't anyone interpret in the bureaucratic bowels of any agency that the silence on the part of the Advocate is approval, because it isn't and should never be. Does your agency have anything in writing certifying from the Advocate he approved any of this?

Mr. **Bettenberg**. No, we do not. So far as I know, they don't so certify.

Mr. **Ireland**. All you did was assume——

Mr. **Bettenberg**. I respectfully disagree with you, Mr. Chairman. We, in fact, had representatives who met with representatives——

Mr. **Ireland**. Well, meeting with somebody doesn't mean approval. Just because you go meet with somebody——

Mr. **Bettenberg**. I could have Mr. Haspel join me, and give you an indication of the tone of the conversation.

Mr. **Ireland**. Tone of conversation? You tell me yes or no! Did you have an approval from the Advocate that this was OK? Yes or no? Did you have approval?

Mr. **Bettenberg**. I guess I would say yes.

Mr. **Ireland**. Would you show us some documentation of that?

Mr. **Satterfield**. Mr. Chairman, if I could try to take a cut. As I understand our procedures between Interior and SBA, there has never been a procedural mechanism established whereby SBA responds in writing or by giving certification or any other way to indicate they have accepted the certification that the Interior Department has made.

Mr. **Ireland**. Now we are back into all the procedures and the gobbledygook that this Nation has had a belly full of. Don't you think that commonsense—unless we have thrown it out—would dictate if you are going into something here, you've already had some feelers not only from the advocate's office, but also certainly from small business, something is wrong? Don't you think that it would be wise to say, "Is this right, or is it wrong? We want to comply with the law."

Mr. **Satterfield**. What I am trying to say, and I am probably not saying it very well, is that initially a copy of the data was supplied to the SBA. The desk officer at SBA came to Interior and raised questions and issues with the Interior Department representatives at the staff level which they supplied answers to, thinking that we had, and making an attempt to try to address——

Mr. **Ireland**. But again——

Mr. **Satterfield**. The SBA concerns, and we thought we had done so.

Mr. Ireland. But this belies what the gentleman just said. You just went on silence, right? That's exactly what you're telling me. You didn't hear anything back from that; so you assumed they must approve of it.

Mr. Satterfield. We went on silence after our response regarding the fact that no further questions were raised; yes, sir.

Mr. Ireland. Well I would suggest sincerely that you don't do that any more.

Mr. Satterfield. Well, we may have been involved ourselves in miscommunications, and we certainly don't intend to imply anything differently. We were just attempting, in what we thought was a substantive and full response, to respond to the issues that had been raised and in good faith, to try and accommodate any questions we knew SBA had.

Mr. Ireland. I don't for 1 minute doubt your sincerity or your good faith. I do doubt the fact that you acted in a proper manner by just saying silence meant everything you'd done was right when you've got a regulation or a law to comply with. If you really sincerely wanted to know, it would seem to me you'd get some answers, which you didn't do——

Mr. Bettenberg. Mr. Chairman, I don't understand what answers we are seeking here. We had representatives who met with SBA. The person from SBA whom our staff met with said that we would hear from them only if they had problems, and we would not hear any further from them in this case.

Mr. Ireland. They have right up to the last minute to say whether they have problems or not.

Mr. Bettenberg. They have right up to the last minute to say they have problems, but in the meantime, we had gone through a rulemaking proceeding on the basis of those indications. We thought we were complying with the law. The court at the district level apparently felt so as well.

Mr. Ireland. Now, wait a minute, wait a minute. Forget the District Court. As we have said, we're not talking about the results of this case.

Mr. Bettenberg. But you are implying that somehow or other in the proceeding that there would have been no problem had we done things right. Without getting into the case, what I am submitting is that we think that we did things right. We think that we took into account seriously and on our internal record the effects of this rule, not only on the general economy, but on the program we run, and also on small business.

Mr. Ireland. Well, we will be advised whether you think that or not. Along the line somewhere along the line perhaps on another case, you're going to hear from the Advocate and be prepared to hear from him at the last minute, knowing very well that silence isn't approval. You're going to have to do that. Now, with that in mind, what I'm talking about is the next time, don't count on that being approval until that moment comes. If you want something more definite than that, get with the Advocate ahead of time.

Mr. Bettenberg. Well, we surely will understand that.

Mr. Ireland. Through you, I'm saying that to every other agency because it's easy to do. You know, it's no trick to get ahold of him. Where there is smoke, there is fire. When there are issues going around and there are complaints and concerns, commonsense says that you don't go roaring into a decision thing until those things have been resolved. In this case, they weren't resolved or you wouldn't have been in court.

Don't count on silence. Don't count on the Advocate not coming in at the last minute, and use a little commonsense legalese and get to the heart of the issue and get it solved before you get there.

Mr. **Bettenberg**. Well, that's why I think it is very beneficial for us to work with SBA well in advance before we "get there."

Mr. **Ireland**. Absolutely; but let's not get hung up on these little legalized niceties as people's only defense for not doing what commonsense would suggest that they do.

Mr. Stenholm, do you have any further questions?

Mr. **Stenholm**. No.

Mr. **Ireland**. Mr. Topping, do you have anything further?

Mr. **Topping**. No.

Mr. **Ireland**. In summation, I would say we've got a lot of people trying to work in the same direction. We also have some bureaucratic turf defense, as well as a failure to see the viewpoint of the man in the street that we are all supposed to be serving. With this interchange and the resolution of the memorandum that Mr. Swain and Mr. Sanders have sent to the Justice Department, I think we can get on with the business of making this law work the way that Congress intended it to.

I thank you all very much.

[Whereupon, at 11:28 p.m. the subcommittee was adjourned, to reconvene subject to call of the Chair.]

OVERSIGHT OF REGULATORY FLEXIBILITY ACT
(Part 2)

TUESDAY, JULY 27, 1982

House of Representatives,
Subcommittee on Export Opportunities and
Special Small Business Problems,
Committee on Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2359-A Rayburn House Office Building, Hon. Andy Ireland (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN IRELAND

Mr. Ireland. Good morning. Our subcommittee continues its oversight this morning of the Regulatory Flexibility Act. Today we will address ourselves to a specific rulemaking proceeding of the Federal Aviation Administration entitled "Parts Manufacturers Approvals: Falsification of Airworthiness Certification Documents." Small businesses have complained to the subcommittee that the proposed regulation is anticompetitive and in violation of both the Regulatory Flexibility Act and Executive Order 12291. In addition, the claim has been made that this is the fifth effort in recent years by the FAA to revise the rules covering parts manufacturers and thus reduce competition in the industry.

During World War II large quantities of aircraft engines, and spare parts to support them, were manufactured to assist the war effort of the United States and her allies. At the war's end, the Government declared much of this material surplus, and disposed of it through various agencies.

Engines and parts disposed in surplus sales were often sold at a fraction of the Government's original acquisition cost. This surplus material helped make possible a rapidly expanding commercial aviation industry in this country. However, the availability of relatively inexpensive surplus replacement parts resulted in manufacturing curtailment. This led to some lack of products manufactured by the Nation's original equipment manufacturers. Incidentally, these are called OEM's and from time to time those most familiar with this subject will be referring to OEM's. So those of you who are interested can remember that those are original equipment manufacturers.

In the 1950's those parts with a high replacement factor became more and more scarce, forcing the price of these high usage parts up to the point where new manufacture once again became profitable. However, the original equipment manufacturers did not respond to this need adequately. This resulted in others, not all of whom were necessarily qualified, entering the field of parts manufacturering.

The Civil Aeronautics Administration in 1956 established an economically feasible system to provide for safe, supervised manufacture of replacement parts by independent manufacturers. The basics of the regulatory scheme are essentially unchanged since 1956, except that now this is regulated by the Federal Aviation Administration.

In order to be able to manufacture for sale a replacement or modification part for an aircraft, aircraft engine, or appliance, a person other than an OEM must obtain a parts manufacturer approval. This parts manufacturer approval you will hear referred to as a PMA throughout all these hearings. To obtain a so-called PMA requires application for approval of the design of each part and the establishment of a satisfactory fabrication inspection system.

Assuming a satisfactory inspection system, the real key to obtaining a PMA or a parts approval is obtaining approval of the design of the part. There are three ways to obtain approval of a design: First, being a licensee of an original equipment manufacturer under a licensing agreement; second, conducting extensive, expensive, elaborate tests to establish the airworthiness of a part, and third, submission of drawings which enable the FAA to determine that the independently produced replacement part will be identical to the corresponding part approved in the type certificate.

For an independent, nonlicensed parts manufacturer there are only two possible methods to obtain design approval: testing, and establishing under the rules the identicalness of design. Of these two methods only one is alleged to be economically feasible, and of course that is establishing the identicalness of design. As we can all see this issue is a complex one. In fact, the FAA believes everyone has grossly misunderstood their proposal and they are attempting to increase competition. That remains to be seen.

In addition to the rule proposal, other issues have surfaced. The most disturbing to me is the allegation that the Government is paying anywhere from 6 to 12 times as much for aircraft replacement parts as small manufacturers would charge. We are here this morning to gather the facts and hear both sides of the question.

Mr. IRELAND. With that background I would ask my colleague, Mr. Skelton of Missouri, if he has a comment to make?

Mr. SKELTON. I have no comments at this time.

Mr. IRELAND. Mr. Topping, do you have a comment right now, sir?

Mr. TOPPING. No.

Mr. IRELAND. Our first witness this morning is Mr. Charles B. Dedmon, vice president of Superior Air Parts, Inc., Addison, Tex. Mr. Dedmon, we are pleased to have you here. If you will step forward.

TESTIMONY OF CHARLES B. DEDMON, VICE PRESIDENT, SUPERIOR AIR PARTS, INC., ADDISON, TEX., ACCOMPANIED BY ROBERT BECKMAN, ATTORNEY, BECKMAN & FARMER, WASHINGTON, D.C.

Mr. **Dedmon**. Mr. Chairman, members of the subcommittee, I am Charles Dedmon and this is Robert Beckman, my attorney. Thank you very much for inviting me to testify.

I am the vice president of a small, family-owned business. We have some 49 employees. We are very grateful that this subcommittee is examining the aircraft and aircraft engine replacement parts industry. The pending proposal before the FAA, NPRM 77-19C, is the most recent of a long string of anticompetitive actions. If adopted, NPRM 77-19C will destroy competition in aircraft replacement parts.

We have been in business for 15 years manufacturing high-quality replacement parts which fully meet all FAA specifications for airworthiness. Our parts are indistinguishable from the parts made by the original engine manufacturers or OEM's in terms of quality, serviceability, and airworthiness. There is, however, one big difference: Our prices are lower than the OEM's.

I have attached to my written testimony two comparisons of costs of some of the parts used in a typical overhaul of popular 6-cylinder piston aircraft engines. This comparison shows what the typical small independent overhauler pays for these parts from an authorized distributor of Teledyne Continental Motors or from an authorized distributor of Avco-Lycoming. They also show what the same parts cost the independent overhauler if purchased from Superior Air Parts.

The first comparison, exhibit A, is for a Teledyne Continental IO-520 engine. The cost of the parts if purchased from a Teledyne Continental distributor is $4,288.51. The same parts purchased from Superior Air Parts is $2,599.54 or 60 percent of the cost of purchasing from the Teledyne distributor.

The second comparison, which is exhibit B, is for an Avco Lycoming IO-540 engine. The cost of the parts if purchased from an Avco-Lycoming distributor is $3,864.11. These same parts purchased from Superior Air Parts are $2,173 or 57 percent of the cost of purchasing from an Avco-Lycoming distributor.

Mr. Chairman, I have by way of example an example of typical parts if I might hand these to you. These two parts are valve guides for an Avco-Lycoming engine. They are identical in material and in standards affecting airworthiness. These are valve guides and the cost of manufacturing these valve guides is $2.70. Superior sells these parts for $5.50. Avco-Lycoming sells these parts to their distributors for $13.48. We need to consider, please, that these are examples of PMA parts from independent overhaulers versus OEM parts, and not necessarily a Superior versus Avco comparison because a comparison carries across all manufacturing lines and this is not a Superior/Avco controversy.

How can we offer such lower prices? Part of the answer is that we are efficient; we control our overhead; and we work very hard. But, frankly, this is only part of the answer. The real answer is that the OEM is charging unrealistically high prices to buyers of its replacement parts.

There is intense price competition between the OEM's for the sale of original equipment. For example, Teledyne Continental and Avco-Lycoming, the two principal manufacturers of piston engines for aircraft, shave their prices to get their engines chosen by the airplane manufacturers such as Piper, Cessna, and Beech.

Mr. **SKELTON**. May I interrupt for a question, Mr. Chairman?

Mr. **IRELAND**. Yes.

Mr. **SKELTON**. Who purchases these parts: The Government and who else?

Mr. **DEDMON**. The Government may purchase these parts, but also independent overhaul facilities, people qualified to perform repairs on aircraft engines.

Mr. **SKELTON**. What percentage is bought by the Government?

Mr. **DEDMON**. I have no idea what percentage.

Mr. **SKELTON**. I would like to know, sir. I would like to know it.

Mr. **DEDMON**. If I can find that information, I will be most happy to give it to the subcommittee.

Mr. **SKELTON**. I would appreciate it. Thank you, sir.

Mr. **IRELAND**. I might add, sir, the gentleman from Missouri is a prominent member of the Armed Services Committee so he is very interested in that percentage.

Mr. **SKELTON**. You bet, and what they pay.

Mr. **DEDMON**. Right and if we can find that information, we will be most happy to submit that. Once an engine is in the airplane, there is created a market for replacement parts for the life of that engine. The FAA requires parts to be replaced on a regular basis and failure to replace parts affecting airworthiness is a Federal crime.

Parts for the engine made by a particular manufacturer are unique to that engine. Thus, there is a huge, captive market. The OEM's charge what the market will bear. If someone wants to keep flying his airplane, he pays what he must for replacement parts. Most of the parts for a piston engine are not machined by the OEM. The OEM buys pistons, bearings, rings, and so forth from specialized subcontractors, or as we refer to them in the industry "vendors," who are the experts in making a particular part. The OEM's then assemble these parts into an aircraft engine. The OEM does not have the manufacturing capability or the know-how to manufacture most of the individual parts in its own engines. We know what the vendors charge for these parts because we buy from these same vendors in many cases. The OEM's markup is purely monopoly pricing.

The OEM's and independent parts manufacturers like ourselves do not just resell the parts we buy from vendors. The parts that come from the vendors cannot be put into airplanes without a lot more being done to them to assure they meet the rigid inspection and marking requirements established by the FAA. The OEM's and independent parts manufacturers like Superior have what are called fabrication inspection systems. A fabrication inspection system must be approved by the FAA. The FAA supervises these systems and assures that they are adhered to. The requirements, and they are extensive and rigorous, are set forth in section 303 of part 21 of the Federal Aviation Regulations (FAR), 14 CFR. The regulations specify that the system shall include inspections and tests to determine that materials are as specified in the design data; that materials subject to damage and deterioration are suitably stored and adequately protected; that processes affecting quality and safety are accomplished in accordance with specifications accepted by the FAA; that parts in process are inspected for conformity with the design data at points in production where accurate determination can be made; that current design drawings are readily available to manufacturing and inspection personnel and used when necessary; that major changes to the basic design are adequately controlled and approved; that rejected materials and components are segregated and identified to preclude their use in the finished part, and that inspection records are maintained, identified and retained for at least 2 years.

Establishing and operating a fabrication inspection system is expensive. It is the fabrication inspection system that assures that a part is airworthy. But we know what it costs to establish and operate a fabrication inspection system. Ours is no different from the OEM's fabrication inspection system.

Independent parts manufacturers' parts are entirely interchangeable with the OEM's parts and are FAA approved for installation in airplanes. Because our parts are cheaper, independent parts manufacturers save the airplane owners many millions of dollars. Let me quote a statement the Air Transport Association, representing the Nation's scheduled airlines, made to the FAA last year in a comment to NPRM 77-19C:

> The airlines' primary concern is safety. While economics is a secondary concern, subservient only to safety, it is nevertheless of significant importance. Any rules and regulations which are adopted should also have safety as their primary concern but economics should not be ignored. The airline industry is in vital need of a continuing flow of safe and FAA approved replacement and modification parts. The source of these parts should not be limited either by implication or regulation to any one source. While we do not believe this is the intent of FAA, there is some concern that the proposed rule, if adopted, could result in the reduction of available sources for safe, economical FAA approved parts, particularly replacement parts.

The availability of independently manufactured replacement parts is not only economically vital to the Nation's airlines and air travelers, but is also the foundation of many small businesses throughout the country. Small overhaulers are able to offer lower prices to consumers and make profits for themselves by buying lower priced FAA approved replacement parts from independent parts manufacturers. These small businessmen will be seriously damaged, perhaps put out of business, by the FAA's proposed regulation, NPRM 77-19C, as they themselves have said in the comments they submitted to the FAA in docket 17147..

In order to manufacture a particular part you need FAA approval. The OEM is authorized to manufacture replacement parts by virtue of a type certificate, issued by the FAA, authorizing the original manufacture of the equipment. An independent parts manufacturer may get approval, called parts manufacturer approval ("PMA") three ways:

First, by a license from the type certificate holder. You would rarely expect the type certificate holder to license someone to engage in price competition with it.

Second, by going through elaborate expensive tests to prove that your design will produce a part of equivalent airworthiness. This is not economically feasible in most cases. It can cost over $100,000 to conduct tests and most parts sell for small amounts of money such as $20 or $40.

Third, the usual way to obtain a PMA is to submit design data which the FAA compares with the type certificate holder's design data to determine that a part of equivalent airworthiness will be produced.

The design data comparison method called "identicality," has been a successful operation for over 25 years. PMA parts are airworthy and have an excellent safety record. We know of no reason to change the system on grounds of safety.

The task of comparing the PMA applicant's design data with the type certificate holder's design data is not administratively burdensome. We have seen some of the FAA's own reports of man-hours required to process a PMA application. It appears that a typical FAA office will get one or two PMA applications per week and spends 1 to 5 hours of professional time on each application. Plainly, there is no serious administrative burden or, at least, we have seen no evidence that any serious burden exists.

Where do PMA applicants get their design data? First, let me say that there is no evidence that PMA applicants steal designs from the type certificate holders. There is no evidence of industrial espionage. Please remember that every time a PMA application is filed with the FAA the first thing that the FAA does is to telephone the type certificate holder to inform him the application has been filed. The FAA does not necessarily keep the type certificate holder's designs on file. The FAA asks the type certificate holder to send its design data to the FAA so that an FAA engineer can perform the design comparison. If the type certificate holder really had a valid proprietary right to the design, you would expect the type certificate holder to sue immediately. There are very few successful suits by type certificate holders asserting proprietary rights.

The OEM's claim that they have proprietary rights in their designs. They claim that their designs contain trade secrets. This is not true in the vast majority of cases. We come by our designs honestly and history has shown that they will produce safe parts, which are interchangeable with the OEM parts.

The OEM's have been unable to put us out of business by fair competition in the marketplace. The OEM's have 80 percent or more of the market for replacement parts for aircraft piston engines, but they want all of it. With the mentality of monopolists, they do not compete with us in price. They use strong-arm tactics and the Federal Aviation Administration to do their dirty work.

In the early 1970's, as we started to make an impact on the OEM's markets, we found ourselves unable to get vendors to sell us parts. The vendors had been threatened by the OEM's that if the vendors sold to us, the OEM's would not deal with them. By 1975, we were faced with ruin. We filed an antitrust suit which has since been settled on terms satisfactory to us. We now have access to all the vendors.

We have also been in almost continuous battle with the FAA, fighting for our lives. The notice of proposed rulemaking, 77-19C, which this subcommittee is considering, is only the most recent of a long list of similar proposals designed by the OEM's and implemented by the Federal Aviation Administration to destroy independent parts manufacturers, many of whom are small businessmen.

There have been numerous proposals to change the regulations over the years, and not, I might say, requested by PMA holders. We are here looking at NPRM 77-19C which is only the most recent version of a virtually continuous effort by the OEM's to close down competition by independent replacement parts manufacturers by having the FAA change the regulations to make it impossible to get PMA's.

In 1967, Pratt & Whitney, an OEM, asked the Federal Aviation Administration, to require PMA applicants to supply technical data to establish the airworthiness of a part, in other words, the test data. The FAA obliged and in 1969 issued NPRM 69-36. There was a storm of protest. In 1972, the FAA backed down, admitting that this requirement "cannot be justified in the interest of safety." Undaunted by this setback, another leading OEM, Avco-Lycoming, hired George Carneal, who had just retired as FAA General Counsel, to communicate with the man who replaced him, Gerard Turner. Carneal and Turner agreed that PMA holders who, like many OEM's, used subcontractors to perform a substantial portion of the manufacturing process could not operate as FAA-approved replacement parts manufacturers.

There was a curious exchange of letters from Carneal to "Dear Jerry" and from Turner to "Dear George" in October and November 1973. These letters became an instant FAA interpretation.

Mr. **Ireland**. Mr. Dedmon, we have been furnished a copy of the "Dear George" and "Dear Jerry" letters, and unless there are objections, we will put those in the record at this point.

Mr. **Dedmon**. I have no objection, sir.

[The letters referred to above follow:]

Hogan & Hartson,
Washington, D.C., October 25, 1973.

Gerard J. Turner,
General Counsel, Federal Aviation Administration, Department of Transportation, Washington, D.C.

Dear Jerry: We have been asked by a client whether the provisions of FAR 21.303, as illuminated by AC 21-303-1A, would permit the issuance of a Parts Manufacturer Approval ("PMA") to produce replacement or modification parts for sale for installation on a type certificated product under the following conditions.

The applicant for the PMA would not itself manufacture any of the replacement parts; rather, it would contract with outside manufacturers to manufacture and ship all the parts to it. None of the outside manufacturers which would actually manufacture the replacement parts would themselves hold a PMA, a type certificate, or a production certificate for the parts in question, nor would such manufacturers be licensed by any type certificate holder. The PMA would, in its own facilities, inspect the parts received from the outside manufacturers. After inspection, the parts would be packaged, warehoused, and then mailed out by the PMA to fill orders the PMA had solicited.

Based upon our review of FAR 21.303, as well as AC 21-303-1A, we have concluded it is crystal-clear that the regulatory scheme never contemplated that a PMA could conduct its operations, essentially as a parts distributor or wholesaler, in the manner outlined above. Nevertheless, in advising our client, it would be very helpful for us to know whether our interpretation of FAR 21.303 under the facts assumed above squares with the view of the Chief Counsel's office. I would, therefore, greatly appreciate it if you or an appropriate member of your staff would furnish me with such an interpretation.

Thank you very much for your assistance.

Sincerely,

GEORGE U. CARNEAL.

NOVEMBER 25, 1973.

Mr. GEORGE U. CARNEAL, Jr.,
Hogan & Hartson, Washington, D.C.

DEAR GEORGE: This is in answer to your letter of October 25, 1973, requesting our opinion on a question relating to issuance of Parts Manufacturer Approval ((PMA) under § 21.303 of the Federal Aviation Regulations. The question, as it appears from your letter, is whether the FAA would issue a PMA to an applicant who would inspect parts received from outside manufacturers not having PMA's and then package, store, and distribute the parts.

It appears that the potential applicant would be merely a distributor, not engaged in producing parts as required by the regulations and would, therefore, not be eligible for a PMA. While it is within the contemplation of the regulation that a PMA holder could make use of parts, materials, and processes supplied by outside sources, he must, in some way, contribute to the manufacturing of the product. It would, as you suggest in your letter, subvert the regulatory scheme to issue a PMA to a person acting merely as a distributor.

I would point out, though, that the regulation operates to control producers of parts, and that a person wishing to act as a distributor for parts produced by PMA holders has no need to apply to the FAA for any authorization to do so.

If I can be of any further help in this or any other FAA-related matter, please do not hesitate to contact me.

Sincerely,

GERARD J. TURNER,
Chief Counsel.

Mr. DEDMON. These letters became an instant FAA interpretation. Without notice or any chance to be heard, we and the other PMA holders who used subcontractors were out of business. This ruling of course did not affect Mr. Carneal's client, Avco Lycoming. Avco could continue to use subcontractors to perform a substantial portion of their manufacturing. This ruling only worked against PMA's, not OEM's.

There was a storm of protest and in July 1974, the FAA backed down saying,

> There appears to be no reason in the interest of safety why a PMA holder should personally have to engage in any of the manufacturing involved in the production of the parts, provided that he assures that all persons performing that manufacturing comply with his fabrication system.

The tireless OEM's hit again in 1975. Again, without notice or opportunity to be heard, the FAA in June 1975 issued a memorandum imposing an impossible requirement to get a PMA: The PMA applicant had to provide "a copy of the FAA approved type certificate holder's drawing." Only a licensee of the type certificate holder could have the type certificate holder's drawing. We were out of business again until, after a storm of protest, the FAA in November 1975 backed down and withdrew this impossible requirement.

The fact that the FAA backed down in 1974 and in 1975 does not mean that the OEM's were unsuccessful in using the regulatory process to harm Superior Air Parts. In fact, on July 12, 1974, we petitioned the FAA to grant us PMA's on 176 separate items upon which the FAA had already granted us design approval. Twenty of those products were already manufactured and sitting in Superior's warehouse, but could not be sold. In fact, during this 2-year period, there were only 4 days when Superior could obtain PMA's, even though the rule was not significantly changed from the way it had been written for almost 20 years.

In September 1977, the FAA started the rulemaking this subcommittee is particularly considering. NPRM 77-19 proposed to amend the regulations to require in effect what had been administratively required and withdrawn in 1975. NPRM 77-19 proposed that the requirements to obtain a PMA be amended to require the PMA applicant to provide the detailed information in the upper right hand corner of the OEM's drawing, that is all the drawing revisions and revision dates. Only the type certificate holder knows the revisions and revision dates on his drawing. This requirement had no relation to safety.

There was a storm of protest and the FAA backed down again. NPRM 77-19 was withdrawn on January 15, 1981. In its place, the latest proposal was issued: 77-19C. NPRM 77-19C is worse than 77-19. Like 77-19, it has an impossible requirement. It requires the PMA applicant to provide the type certificate holder's drawing revision designation for which the PMA applicant's replacement part is equivalent. This requires the PMA applicant to know the drawing revision designations on the type certificate holder's drawing which he cannot know.

In addition—and this is diabolical—the proposed regulation in NPRM 77-19C would require PMA parts to be marked with the type certificate holder's drawing revision designation. The OEM does not mark its own parts with its drawing revision designation. If this regulation is adopted, millions of dollars worth of parts produced by PMA holders will be unsalable and unusable. PMA manufacturers will be wrecked. Overhaulers, many of whom are small businesses, will face ruin with their inventories of PMA parts being unusable because they could not be marked as the regulation would require.

The only parties who have a good word for NPRM 77-19C are the OEM's who have said in their comments that it is "a step in the right direction." And what is the "right direction"? In Avco-Lycoming's comments of May 12, 1981, they state "elimination of identicality would appear to be the surest method of clearing up this matter." In Avco's reply comments of September 21, 1981, the "right direction" is even clearer: "Identicality should be eliminated."

One of the issues before this subcommittee is to decide whether the FAA is implementing the Regulatory Flexibility Act and, if so, is it doing it correctly? Clearly in the case of 77-19C it is not.

None of the salutory provisions of the Regulatory Flexibility Act was complied with. The Regulatory Flexibility Act recognized that small businessmen do not read the Federal Register. The act requires specific efforts to achieve actual notice by solicitation of small entity participation in the rulemaking process. Superior Air Parts was a principal objector to NPRM 77-19. We are specifically mentioned in the NPRM 77-19C. Yet the FAA did not bother to send us a copy of NPRM 77-19C. We found out about it through the grapevine and got a copy.

We were unable to prepare comments within the time provided. We asked for a reopening of the comment period so that we could comment. While the FAA accorded this courtesy readily to Avco-Lycoming when Avco requested a reopening of the comment period of NPRM 77-19 in order to reply to Superior Air Parts, the FAA turned us down flat. We appealed this refusal to the Administrator of the FAA and on July 2. 1981, the FAA reopened the comment period until August 24, 1981, but did not tell us. The notice granting our request to reopen the comment period was published in the Federal Register on July 23, 1981. As I said, we are not a regular reader of the Federal Register. We found out about it when I got a telephone call from a PMA manufacturer that I know in Alabama on August 3, 1981, telling me that he had heard we had gotten our opportunity to comment.

Another issue before this subcommittee is to determine if in NPRM 77-19C the FAA was justified in certifying that the rule would not have a significant economic impact upon a substantial number of small entities. Clearly, this certification is false. The FAA would have had to make only a superficial examination to determine that a substantial number of small businesses would be affected.

In the background section of NPRM 77-19C, the FAA noted that it had received replies from 147 commenters on the PMA portion. The majority of these comments were from small businesses. The FAA knows that many PMA holders under the identicality statute are small businesses.

Commenters on 77-19 were not only PMA holders and the OEM's. A large number of commenters were operators of aircraft, fixed-base operators and repair facilities. Again, as the FAA well knows, these are mostly small businesses and the FAA noted, "Most of the commenters oppose the proposal."

The FAA should have considered that not only would PMA holders feel a significant economic impact, but their customers would also. Superior serves over 2,500 accounts in the United States. Over 90 percent of these accounts are small businesses. Some of these parts users have commented again and again to the FAA that their livelihood depends on a competitive supply of replacement parts.

Mr. Chairman, the Regulatory Flexibility Act certainly has a marvelous provision in it requiring agencies to notify small businesses of proposed regulations that can affect them. The provisions requiring conferences with small entities so that we could have had an explanation of NPRM 77-19C is particularly important. NPRM 77-19C is virtually unintelligible; it is full of contradictions.

Only one thing is absolutely clear about NPRM 77-19C. It will destroy independent parts replacement manufacturers. On this all the commenters agree.

On one side of this proposition we have big businesses, the OEM's and their organizations who blatantly support this as "a step in the right direction" to doing away with the small, upstart competitors and restoring their full monopoly power over the replacement parts market.

On the other side are small businesses, the PMA holders, fixed-base operators, repair facilities and plane owners. But we are also supported by the Small Business Administration, the Department of Justice, and the Air Transport Association representing the Nation's scheduled airlines. All of these commenters see 77-19C as a step in the wrong direction.

But whether you like 77-19C or not, it is absolutely clear that the Regulatory Evaluation issued with 77-19C is a plain misrepresentation of the effect of the proposal. The Regulatory Evaluation says that burdens are reduced and that PMA applicants will benefit. This is just not so.

Which brings me to the centerpiece of the Regulatory Flexibility Act, the Regulatory Flexibility Analysis. If the FAA had followed the act's requirements, the performance of a Regulatory Flexibility Analysis would have focused the FAA's attention on the effects of its proposal on small businesses. I cannot thank this subcommittee enough for its efforts in enacting the requirement of the the Regulatory Flexibility Analysis and I cannot urge this subcommittee strongly enough to get the FAA to comply with the Act and perform an analysis that we can all see and all comment on.

Also, 8 months after the notice of proposed rulemaking and Regulatory Evaluation were issued, the FAA conducted an internal survey of the regulatory impact of its proposal. The survey was designed to prove the FAA's conclusion. The FAA itself called the information it was collecting essential to the preparation of an economic evaluation of the proposal.

If this subcommittee is able to persuade the FAA to comply with the law and put this essential data in the public record so that we can comment on the FAA's proposal in light of it, we would all be very grateful.

Members of the subcommittee, I have given you my views on the FAA's conduct in the regulation of PMA parts from my perspective as a small businessman in Addison, Tex. I have not minced words and I hope I haven't hurt anyone's feelings. We are fighting for survival and we all need to have the facts on the table.

Over the years Superior Air Parts has maintained a good relationship and open communications with many areas of the Federal Aviation Administration. We have cooperated at our own expense with the FAA at the Washington level and at the district level to promote a series of seminars to upgrade the level of professionalism in aircraft maintenance. We have obeyed both the letter and the spirit of the FAA regulations. Yet now, when the FAA is considering a rule that will have serious effect on Superior Air Parts, the air is one of secrecy.

When we ask to talk to the FAA, they say, "No. It is an ex parte communication. Write us." So, we did. We wrote them on August 24, 1981, and asked them to comply with the Regulatory Flexibility Act. They did not answer. We filed a formal petition with the FAA on February 1, 1982. We formally pointed out that everyone interpreted the proposal in 77-19C as destructive of small business and formally requested the FAA to comply with the Regulatory Flexibility Act. The FAA did not answer.

The Small Business Administration also wrote to them. On March 3, 1982, the Chief Counsel for Advocacy filed formal comments and told the FAA point blank that the certification was erroneous. The FAA did not answer.

I appeal to this subcommittee to do what it can in its oversight functions to get answers. But I also respectfully lay before the subcommittee a Texas solution to prevent this sort of thing from happening again. Put some teeth in the Regulatory Flexibility Act. It is a great statute. It says all the right things for small business. But if the FAA can ignore the act and not even respond to formal petitions, something has to be done.

Thank you for your kind attention. I will be glad to answer any questions.

[Mr. Dedmon's prepared statement follows:]

PREPARED STATEMENT OF CHARLES B. DEDMON, VICE PRESIDENT, SUPERIOR AIR PARTS, INC.

I am the vice president of a small, family-owned business. We have some 49 employees.

We are very grateful that this subcommittee is examining the aircraft and aircraft engine replacement parts industry. The pending proposal before the FAA, NPRM 77-19C, is the most recent of a long string of anti-competitive actions. If adopted, NPRM 77-19C will destroy competition in aircraft replacement parts.

We have been in business for 15 years manufacturing high-quality replacement parts which fully meet all FAA specifications for airworthiness. Our parts are indistinguishable from the parts made by the original engine manufacturers (OEM) in terms of quality, serviceability and airworthiness. There is, however, one big difference: Our prices are lower than the OEM's.

I have attached two comparisons of the costs of some of the parts used in a typical overhaul of popular 6-cylinder piston aircraft engines. The comparison shows what the typical small indpendent overhauler pays for these parts from an authorized distributor of Teledyne Continental or Avco-Lycoming. They also show what the same parts cost the independent overhauler if purchased from Superior Air Parts.

The first comparison is for a Teledyne Continental IO-520 engine. The cost of the parts if purchased from a Teledyne Continental Distributor is $4,288.51. The same parts purchased from Superior Air Parts is $2,599.54 or 60 percent of the cost of purchasing from a Teledyne Distributor.

The second comparison is for an Avco Lycoming IO-540 engine. The cost of the parts if purchased from an Avco Lycoming Distributor is $3,864.11. The same parts purchased from Superior Air Parts is $2,173.00 or 57 percent of the cost of purchasing from an Avco-Lycoming distributor.

How can we offer such lower prices? Part of the answer is that we are efficient; we control our overhead; and we work very hard. But, frankly, that is only part of the answer. The real answer is that the OEM is charging unrealistically high prices to buyers of its replacement parts.

There is intense price competition between the OEM's for the sale of the original equipment. For example, Teledyne Continental and Avco-Lycoming, the two principal manufacturers of piston engines for aircraft, shave their prices to get their engines chosen by the airplane manufacturers such as Piper and Cessna. Once an engine is in the airplane, there is an established market for replacement parts for the life of the engine. The FAA requires parts to be replaced on a regular basis and failure to replace parts affecting airworthiness is a Federal crime.

Parts for the engine made by a particular manufacturer are unique to that engine. There is thus a huge, captive market. The OEM's charge what the market will bear. If someone wants to keep flying his airplane, he pays what he has to for replacement parts.

Most of the parts for a piston engine are not machined by the OEM. The OEM buys pistons, bearings, rings, and so forth, from specialized subcontractors, or as we call them "vendors," who are the experts in making a particular part. The OEM's then assemble these parts into an aircraft engine. The OEM does not have the manufacturing capability or the know-how to manufacture most of the individual parts in its engines. We know what the vendors charge for these parts because we buy from these same vendors in many cases. The OEM's markup is pure monopoly pricing.

The OEM's and independent parts manufacturers like ourselves do not just resell the parts we buy from vendors. The parts that come from the vendors cannot be put into airplanes without a lot more being done to them to assure that they meet the rigid inspection and marking requirements established by the FAA. The OEM's and independent parts manufacturers like Superior have what are called "Fabrication Inspection Systems." A Fabrication Inspection System must be approved by the FAA. The FAA supervises these systems and assures that they are adhered to. The requirements, and they are extensive and rigorous, are set forth in section 303 of Part 21 of the Federal Aviation Regulations (FAR), 14 C.F.R. The regulations specify that the system shall include inspections and tests to determine: that materials are as specified in the design data; that materials subject to damage and deterioration are suitably stored and adequately protected; that processes affecting quality and safety are accomplished in accordance with specifications accepted by the FAA; that parts in process are inspected for conformity with the design data at points in production where accurate determination can be made; that current design drawings are readily available to manufacturing and inspection personnel and used when necessary; that major changes to the basic design are adequately controlled and approved; that rejected materials and components are segregated and identified to preclude their use in the finished part, and that inspection records are maintained, identified and retained for at least 2 years.

Establishing and operating a Fabrication Inspection System is expensive. It is the Fabrication Inspection System that assures that a part is airworthy. But we know what it costs to establish and operate a Fabrication Inspection System. Ours is no different from the OEM's Fabrication Inspection System.

Independent parts manufacturers' parts are entirely interchangeable with the OEM's parts and are FAA-approved for installation in airplanes. Because our parts are cheaper, independent parts manufacturers save the airplane owners many millions of dollars. Let me quote a statement the Air Transport Association, representing the Nation's scheduled airlines, made to the FAA last year in a comment to NPRM 77-19C:

"The airlines' primary concern is safety. While economics is a secondary concern, subservient only to safety, it is nevertheless of significant importance. Any rules and regulations which are adopted should also have safety as their primary concern but economics should not be ignored. The airline industry is in vital need of a continuing flow of safe and FAA approved replacement and modification parts. The source of these parts should not be limited either by implication or regulation to any one source. While we do not believe this is the intent of FAA, there is some concern that the proposed rule, if adopted, could result in the reduction of available sources for safe, economical FAA approved parts, particularly replacement parts."

The availability of independently manufactured replacement parts is not only economically vital to the nation's airlines and air travelers, but is also the foundation of many small businesses throughout the country. Small overhaulers are able to offer lower prices to consumers and make profits for themselves by buying lower-priced FAA approved replacement parts from independent parts manufacturers. These small businessmen will be seriously damaged, perhaps put out of business, by the FAA's proposed regulation, NPRM 77-19C, as they themselves have said in the comments they submitted to the FAA in docket 17147.

In order to manufacture a particular part you need FAA approval. The OEM is authorized to manufacture replacement parts by virtue of a type certificate, issued by the FAA, authorizing the original manufacture of the equipment. An independent parts manufacturer may get approval, called Parts Manufacturer Approval ("PMA") three ways:

(1) By a license from the type certificate holder. You would rarely expect the type certificate holder to license someone to engage in price competition with it.

(2) By going through elaborate expensive tests to prove that your design will produce a part of equivalent airworthiness. This is not economically feasible in most cases. It can cost over $100,000 to conduct tests and most parts sell for small amounts of money such as $20 or $40.

(3) The usual way to obtain a PMA is to submit design data which the FAA compares with the type certificate holder's design data to determine that a part of equivalent airworthiness will be produced.

The design data comparison method, called "identicality," has been in successful operation for over 25 years. PMA parts are airworthy and have an excellent safety record. We know of no reason to change the system on the ground of safety.

The task of comparing the PMA applicant's design data with the type certificate holder's design data is not administratively burdensome. We have seem some of the FAA's own reports of man hours required to process a PMA application. It appears that a typical FAA office will get one or two PMA applications per week and spends 1 to 5 hours of professional time on each application. Plainly there is no serious administrative burden or, at least, we have seen no evidence that any serious burden exists.

Where do PMA applicants get their design data? First, let me say that there is no evidence that PMA applicants steal designs from the type certificate holders. There is no evidence of industrial espionage. Please remember that every time a PMA application is filed with the FAA the first thing that the FAA does is to telephone the type certificate holder to inform the type certificate holder that the application has been filed. The FAA does not necessarily keep the type certificate holder's designs on file. The FAA asks the type certificate holder to send its design data to the FAA so that an FAA engineer can perform the design comparison. If the type certificate holder really had a valid proprietary right to the design, you would expect the type certificate holder to sue immediately. There are very few successful suits by type certificate holders asserting proprietary rights.

The OEM's claim that they have proprietary rights in their designs. They claim that their designs contain trade secrets. This is not true in the vast majority of cases. First of all, there are no valid patents on most designs. Many parts are not patentable, and if they were patentable, the patents have expired. In many cases, the part was designed by the vendor not by the OEM. In many cases, the designs were sold to the government or otherwise published. Finally, once the parts are in commerce, they can be reverse engineered which constitutes publication of any secret that may have existed.

Superior obtains its designs in entirely legitimate ways. Superior conducts reverse engineering and developmental engineering. We have been given designs by the military which in many cases paid for the development of the engine or acquired the designs of the parts when it purchased the engines from the OEM's. Another principal source of designs is the vendors. It obtains updates of designs of certain parts with applications in Lycoming engines from Lycoming pursuant to agreements reached settling the litigation between us in which Superior conceded, for the purpose of the settlement, certain proprietary rights of Lycoming. We come by our designs honestly and history has shown that they will produce safe parts which are interchangeable with the OEM's parts.

The OEM's have been unable to put us out of business by fair competition in the marketplace. The OEM's have 80 percent or more of the market for replacement parts for aircraft piston engines, but they want all of it. With the mentality of monopolists, they do not compete with us in price. They use strong arm tactics and the Federal Aviation Administration to do their dirty work.

In the early 1970's, as we started to make an impact on the OEM's markets, we found ourselves unable to get vendors to sell us parts. The vendors had been threatened by the OEM's that if the vendors sold to us, the OEM's would not deal with them. By 1975, we were faced with ruin. We filed an antitrust suit which has been settled on terms satisfactory to us. We now have access to all the vendors.

We have also been in almost continuous battle with the FAA, fighting for our lives. The notice of proposed rulemaking, 77-19C, which this subcommittee is considering, is only the most recent of a long list of similar proposals designed by the OEM's and implemented by the Federal Aviation Administration to destroy independent parts manufacturers, many of whom are small businessmen.

First, the FAA has undertaken to recognize the OEM's claim to proprietary rights in their data. In NPRM 77-19C, the FAA says in its preamble:

"The FAA has historically refrained from any involvement in conflicting claims concerning PMA applicants' rights in the data they present to the FAA. The FAA's primary concern is safety and the FAA has no authority to determine proprietary rights." (46 Fed. Reg. 3777)

It is true that the FAA's primary concern is safety. It is true that the FAA has no authority to determine proprietary rights. But it is not true that the FAA has historically refrained from any involvement in conflicting claims concerning PMA applicants' rights in the data they present to the FAA. The FAA in fact treats all the type certificate holder's design data as proprietary. FAA Order 8110.4, paragraph 20.c(2) directs all PMA personnel not to disclose any type design data submitted to the FAA without the written consent of the "owner."

The FAA adheres to this order. When I submit a design that I know will produce an identical part to the OEM's part, not infrequently the design is rejected and I am not told why. I do not know whether the FAA examiner is holding my design and the type certificate holder's design up to a lightbulb to see if it is identical down to irrelevant differences such as a chamfer instead of a radius on a nonessential edge. All I am told is that my design is rejected.

If there is one thing that any citizen of this country is entitled to when applying to the Government for permission to carry on a business activity it is that he gets a statement of reasons of why he is being turned down so he can either amend his application or appeal an arbitrary denial. The FAA works cooperatively with the

OEM and steers the OEM toward approval for a type certificate. The OEM is told clearly where its designs are deficient. Independent small businessmen who want to compete with OEM's are not treated the same way. Why? Because the FAA treats the type design data as proprietary without any right to do so. As I read out to you from the preamble from NPRM 77-19C, the FAA admits that it "has no authority to determine proprietary rights." But it does so, and it is a very effective way of preventing PMA competition.

The FAA thinks that it is caught in the middle in a "free rider" situation. In other words, the FAA accepts the OEM's argument that the OEM developed the design of a part and the PMA manufacturer is getting a free ride. There is no substance to this argument. In many cases, the development was at Government expense and then the government bought the equipment for military use, thus paying for the development not once but twice. In many cases the development was by the vendor who is fully entitled to increase his sales by providing the design to an independent parts manufacturer. In those cases where the OEM did develop the design, the decision that he must disclose his design to the FAA when he applies for a type certificate was made by Congress. Congress also provided the circumstances under which the FAA may withhold disclosure. Section 1104 of the Federal Aviation Act, 49 U.S.C. § 1504, provides that (1) there must be a written objection to disclosure and (2) information shall be withheld,

"If disclosure of such information would prejudice the formulation and presentation of positions of the United States in international negotiations or adversely affect the competitive position of any air carrier in foreign air transportation."

Obviously, telling a PMA applicant the specific reasons why his application to make a replacement part if being denied has nothing to do with international negotiations or foreign airline competition. There is no basis in law for the FAA to disadvantage PMA applicants in this manner. It is significant that prior to 1978, section 1104 of the Federal Aviation Act had provided that information shall be withheld when, in the judgment of the FAA, disclosure "would adversely affect the interests" of the person who supplied the information and who objected. Congress deleted the criterion of adverse effect on the objector's interest and replaced that criterion with the language I quoted relating to international negotiations and competition with foreign airlines.

Thus, the FAA has no basis whatsoever for turning a PMA application into a game of "blind man's bluff." The FAA application to refuse to discuss engineering matters relating to the airworthiness of a PMA applicant's design is pure favoritism to the OEM's.

The FAA's unfair treatment of the issue of proprietary rights is only one of our problems with the FAA's administration of the regulations. I could quote numerous examples of no PMA's at all being approved while one individual is in charge of reviewing applications, and then the same applications being approved by another individual when the first individual retires or is transferred. There is great opportunity for unfair and arbitrary action, and PMA applicants get more than their share.

The unfair treatment I have described takes place under the existing regulations. No one has produced any evidence that there is anything wrong with the way the existing regulations are written. The problems we have are with the FAA's administration of the regulations, not with the regulations themselves.

There have been numerous proposals to change the regulations over the years, not, I might say, requested by PMA holders. We are here looking at NPRM 77-19C which is only the most recent version of a virtually continuous effort by the OEM's to close down competition by independent replacement parts manufacturers by having the FAA change the regulations to make it impossible to get PMA's.

In 1967, Pratt & Whitney, an OEM, asked the Federal Aviation Administration, to require PMA applicants to supply technical data to establish the airworthiness of a part; in other words, test data. The FAA obliged and, in 1969, issued NPRM 69-36. There was a storm of protest. In 1972, the FAA backed down, admitting that this requirement "cannot be justified in the interest of safety." (37 Fed. Reg. 10658 (1972)).

Undaunted by this setback, another leading OEM, Avco-Lycoming, hired George Carneal, who had just retired as FAA General Counsel, to communicate with the man who replaced him, Gerard Turner. Carneal and Turner agreed that PMA holders who (like many OEM's) used subcontractors to perform a substantial portion of the manufacturing process could not operate as FAA approved replacement parts manufacturers. There was a curious exchange of letters from Carneal to "Dear Jerry" and from Turner to "Dear George" in October and November 1973. These letters became an instant FAA interpretation. Without notice or any chance to be heard, we and the other PMA holders who used subcontractors were out of business.

This ruling did not, of course, affect Mr. Carneal's client, Avco-Lycoming. Avco could continue to use subcontractors to perform a substantial portion of the manufacturing. This ruling only worked against PMA's, not OEM's.

There was a storm of protest and in July 1974, the FAA backed down saying, "There appears to be no reason in the interest of safety why a PMA holder should personally have to engage in any of the manufacturing involved in the production of the parts, provided that he assures that all persons performing that manufacturing comply with his fabrication system." (39 Fed. Reg. 24236 (1974))

The tireless OEM's hit again in 1975. Again, without notice or opportunity to be heard, the FAA in June 1975 issued a memorandum imposing an impossible requirement to get a PMA: The PMA applicant had to provide "a copy of the FAA approved type certificate holder's drawing." Only a licensee of the type certificate holder could have the type certificate holder's drawing. We were out of business again until, after a storm of protest, the FAA in November 1975 backed down and withdrew this impossible requirement.

The fact that the FAA backed down in 1974 and 1975 does not mean that the OEM's were unsuccessful in using the regulatory process to harm Superior. In fact, on July 12, 1974, we petitioned the FAA to grant us PMA's on the 176 separate items upon which the FAA had already granted us design approval. Twenty (20) of those products were already manufactured and sitting in Superior's warehouse, but could not be sold. In fact, during this 2-year period, there were only 4 days when Superior could obtain PMA's, even though the rule was not significantly changed from the way it had been written for almost 20 years.

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In addition, NPRM 77-19C has other features such as an open-ended provision for testing all "precision parts" even when the design is identical and the withdrawal of all PMA's held if a false statement is made in any record. These proposals are totally unjustified. NPRM 77-19C is opposed by the U.S. Department of Justice Antitrust Division, the U.S. Small Business Administration, the Air Transport Association representing the Nation's scheduled airlines, PMA holders throughout the country, overhaulers and other users of replacement parts for aircraft and aircraft engines.

The only parties who have a good word for NPRM 77-19C are OEM's who have said in their comments that it is "a step in the right direction." And what is the "right direction"? In Avco-Lycoming's comments of May 12, 1981, they state "elimination of 'identicality' would appear to be the surest method of clearing up this matter." (p. 1) In Avco's Reply comments of September 21, 1981, the "right direction" is even clearer: "Identicality should be eliminated." (p. 6)

One of the issues before this subcommittee is to decide whether the FAA is implementing the Regulatory Flexibility Act and if so, is it doing it correctly. Clearly, in the case of NPRM 77-19C it is not.

None of the salutory provisions of the Regulatory Flexibility Act was complied with. The Regulatory Flexibility Act recognized that small businessmen do not read the Federal Register. The Act requires specific efforts to achieve actual notice by solicitation of small entity participation in the rulemaking process. The Act outlines such techniques as: notice of the rule in Publications likely to be obtained by small entities, such as trade association journals (section 609(2)); a letter in the mail directly from the agency seeking comments on the rule and enclosing a copy of it (section 609(3)); attendance at an agency conference convened to discuss the merits of the rule (section 609(4)), and testimony at an agency hearing on the rule (section 609(4)).

Superior Air Parts was a principal objector to NPRM 77-19. We are specifically mentioned in the preamble to NPRM 77-19C. Yet FAA did not bother to send us a copy of NPRM 77-19C. We found out about it on the grapevine and got a copy.

We were unable to prepare comments within the time provided. We asked for a reopening of the comment period so that we could comment. While the FAA accorded this courtesy readily to Avco-Lycoming when Avco requested a reopening of the comment period on NPRM 77-19 in order to reply to Superior Air Parts, the FAA turned us down flat. We appealed this refusal to the Administrator of the FAA, and on July 2, 1981, the FAA reopened the comment period until August 24, 1981, but did not tell us. The notice granting our request to reopen the comment period was published in the Federal Register on July 23, 1981. As I said, we are not a regular reader of the Federal Register. We found out about it when I got a telephone call from a PMA manufacturer I know in Alabama on August 3, 1981, telling me that he had heard that we had gotten our opportunity to comment.

Another issue before this Subcommittee is to determine if, in NPRM 77-19C, the FAA was justified in certifying that the rule would not have a significant economic impact upon a substantial number of small entities. Clearly, this certification is false. The FAA would have had to make only a superficial examination to determine that a substantial number of small businesses would be affected.

In the background section of NPRM 77-19C, the FAA noted that it had "received replies from 147 commenters on the PMA portion". The majority of these comments were from small businesses. The FAA knows that many PMA holders under the "identicality" statute are small businesses.

Commenters on NPRM 77-19 were not only PMA holders and the OEM's. A large number of commenters were operators of aircraft, fixed-base operators and repair facilities. Again, as the FAA well knows, these are mostly small businesses. And the FAA noted "Most of the commenters oppose the proposal".

The FAA should have considered that not only would PMA holders feel a significant economic impact, but their customers would also. Superior serves over 2500 accounts in the United States. Over 90 per cent of these accounts are small businesses. Some of these parts users have commented again and again to the FAA that their livelihood depends on a competitive supply of replacement parts.

Mr. Chairman, the Regulatory Flexibility Act certainly has a marvelous provision in it requiring agencies to notify small businesses of proposed regulations that can affect them. The provisions requiring conferences with small entities so that we could have had an explanation of NPRM 77-19C is particularly important. NPRM 77-19C is virtually unintelligible. It is full of contradictions.

The preamble to NPRM 77-19C says that "the FAA does not intend to materially increase the PMA applicant's burden." (47 Fed. Reg. 3777). The Regulatory Evaluation says that the PMA applicant's burden is "reduced". In fact the existing requirements for data submission are all retained and, as the comments make clear, the added burdens that the proposed rule would impose on PMA applicants are so drastically increased that independent parts manufacturers will be destroyed.

The Regulatory Evaluation in paragraph II.A. 1(b) says that the proposed rule "eliminates submission of type certificated data showing identicality and FAA review." This statement is both erroneous and contradictory.

Submission of the type certificate holder's data is not a requirement for a PMA applicant. And except for the FAA's ill-fated attempt at "rule making by memorandum" in 1975, it never has been. To require the PMA applicant to possess the type certificate holder's approved data means holding a license agreement. That is clearly not a requirement to hold a PMA.

The statement is contradictory because proposed section 21.302(a)(2) retains the requirement of submission of data showing indenticality and the preamble says that "FAA manufacturing inspection specialists would review the design data submitted . . ." 46 Fed. Reg. 3778. Paragraph III of the Regulatory Evaluation says that "Under the proposed rule, FAA personnel can compare the applicant's data with only a single set of FAA-approved data."

I could go on and elaborate the fundamental inconsistencies in the FAA's notice. Only one thing is absolutely clear about NPRM 77-19C: It will destroy independent parts replacement manufacturers. On this, all the commenters agree.

On one side of this proposition we have big businesses, the OEM's and their organizations, who blatantly support this as a "step in the right direction" to doing away with the small, upstart competitors and restoring their full monopoly power over the replacement parts market.

On the other side are small businesses, the PMA holders, fixed-base operators, repair facilities, and plane owners. But we also are supported by the Small Business Administration, the Department of Justice and the ATA. All of these commenters see NPRM 77-19C as a step in the wrong direction.

But whether you like NPRM 77-19C or not, it is absolutely clear that the Regulatory Evaluation issued with NPRM 77-19C is a plain misrepresentation of the effect of the proposal. The Regulatory Evaluation says that burdens are reduced and the PMA applicants will benefit. This is just not so.

Which brings me to the centerpiece of the Regulatory Flexibility Act, the Regulatory Flexibility Analysis. If the FAA had followed the Act's requirements, the performance of a Regulatory Flexibility Analysis would have focused the FAA's attention on the effects of its proposal on small businesses. I cannot thank this Subcommittee enough for its efforts in enacting the requirement of a Regulatory Flexibility Analysis and I cannot urge this subcommittee strongly enough to get the FAA to comply with the Act and perform an analysis that we can all see and comment on.

Please do not let the FAA issue a final rule with a postponed effective date so that we have a sword hanging over our head. There has not been proper notice; there has not been intelligible notice; there has not been a proper regulatory analysis on which we can comment.

Also, eight months after the notice of proposed rulemaking and Regulatory Evaluation were issued, the FAA conducted an internal survey of the regulatory impact of its proposal. The survey was designed to prove the FAA's conclusion. The FAA itself called the information it was collecting "essential" to the preparation of an economic evaluation of the proposal. We tried to get this data under the Freedom of Information Act and it was denied to us. We got a little of it from various FAA regions before the Washington FAA headquarters found out and forbade us getting the data. If this Subcommittee is able to persuade the FAA to comply with the law and put this essential data in the public record so that we can comment on the FAA's proposal in light of it, we would all be very grateful.

Members of the Subcommittee, I have given you my views on the FAA's conduct in the regulation of PMA parts from my perspective as a small businessman in Addison, Texas. I have not minced words and I hope I have not hurt anyone's feelings. We are fighting for survival and we need all the facts on the table.

Over the years, Superior Air Parts has maintained a good relationship and open communications with many areas of the FAA. We have cooperated, at our expense, with the FAA at the Washington level and at the District level to promote a series of seminars to upgrade the level of professionalism in aircraft maintenance. We have obeyed both the letter and the spirit of the FAA regulations. Yet now, when the FAA is considering a rule that will have serious effect on Superior Air Parts, the air is one of secrecy.

When we ask to talk to the FAA, they say "No. It is an ex parte communication. Write us." So we did.

We wrote them on August 24, 1981, and asked them to comply with the Regulatory Flexibility Act. They did not answer.

We filed a formal Petition with the FAA on February 1, 1982. We formally pointed out that everyone interpreted the proposal in NPRM 77-19C as destructive of small business and formally requested the FAA to comply with the Regulatory Flexibility Act. The FAA did not answer.

The Small Business Administration also wrote to them. On March 3, 1982, the Chief Counsel for Advocacy filed formal comments and told the FAA point blank that the certification was erroneous. The FAA did not answer.

I appeal to this Subcommittee to do what it can in its oversight function to get answers. But I also respectfully lay before the Subcommittee a Texas solution to prevent this sort of thing happening again. Put some teeth into the Regulatory Flexibility Act. It is a great statute. It says all the right things for small businessmen. But if the FAA can ignore the Act and not even respond to formal petitions, something has to be done.

EXHIBIT A.—COST OF PARTS TO AN INDEPENDENT OVERHAULER

[Typical overhaul of an IO-520 engine]

Part	Superior Air Parts	Teledyne Continental distributor	Savings
Gasket set	$70.00	$117.28	$47.28
Piston ring set	315.00	644.32	329.32
Main bearing set	48.00	69.10	21.10
Pistons (6)	390.00	589.84	199.84
Pistons pins (6)	168.00	274.95	106.95
Connecting rod bushing (6)	10.20	15.05	4.85
Connecting rod bearings (12)	20.40	30.65	10.25
Connecting rod bolts (12)	54.00	80.34	26.34
Connecting rod nuts (12)	14.40	27.30	12.90
Valves, exhaust (6)	450.00	675.21	225.21
Valves, intake (6)	132.00	198.59	66.59
Valve springs, outer (12)	18.00	25.90	7.90
Valve springs, inner (12)	13.20	18.17	4.97
Valve seats, exhaust (6)	63.00	172.88	109.88
Valve seats, intake (6)	27.00	68.48	41.48
Valve guides, exhaust (6)	32.40	79.52	47.12
Valve guides, intake (6)	13.50	35.25	21.75
Valve keys (24)	1.92	2.50	.58
Exhaust valve rotators (6)	25.80	38.53	12.73
Rocker arm shafts (12)	36.00	65.13	29.13
Rocker arm bushings (24)	19.20	28.23	9.03
Exhaust nuts (24)	26.40	41.50	15.10
Camshaft	180.00	299.56	119.56
Lifters (12)	132.00	195.78	63.78
Needle bearing	1.70	2.43	.73
Crankshaft oil seal	10.00	22.02	12.02
Crankshaft damper bushing (8)	16.00	29.64	13.64
Counterweight bushing (16)	32.00	51.79	19.79
Counterweight pins (8)	16.40	22.60	6.20
Counterweight pin retaining plate (16)	3.84	5.30	1.46
Retaining ring (16)	1.60	2.50	.90
Lock nuts (2)	1.00	1.40	.40
Starter shaft gear (1)	175.00	240.23	65.23
Clutch spring (1)	30.00	41.23	11.23
Ball bearing (1)	4.00	5.47	1.47
Ball bearing (1)	4.50	6.61	2.11
Retaining ring (1)	.36	.52	.16
Push rod housing (12)	36.00	52.73	16.73
Washers, push rod housing (48)	6.72	9.98	3.26
	2,599.54	4,288.51	1,688.97

EXHIBIT B—COST OF PARTS TO AN INDEPENDENT OVERHAULER

[Typical overhaul of an IO-540 engine]

Part	Superior Air Parts	AVCO Lycoming distributor	Savings [1]
Gasket set	$70.00	$160.10	$90.10
Pistons (6)	330.00	478.84	148.84
Piston pins (6)	120.00	204.75	84.75
Piston pin plugs (12)	12.00	17.63	5.63
Piston rings, compression (12)	114.00	175.03	61.03
Piston rings, oil control (6)	57.00	115.15	54.15
Connecting rod bushings (6)	4.20	6.32	2.12
Connecting rod bearings (12)	30.00	44.92	14.92
Valve seats, intake (6)	120.00	229.48	109.48
Valve seats, exhaust (6)	84.00	185.72	101.72

EXHIBIT B—COST OF PARTS TO AN INDEPENDENT OVERHAULER—Continued

[Typical overhaul of an IO–540 engine]

Part	Superior Air Parts	AVCO Lycoming distributor	Savings [1]
Valve guides, intake (6)	33.00	103.27	70.27
Valve guides, exhaust (6)	33.00	105.14	72.14
Valves, exhaust (6)	432.00	818.92	386.92
Valve keys, exhaust (12)	16.80	26.83	10.03
Valve caps, exhaust (6)	12.00	25.27	13.27
Exhaust studs (12)	14.40	26.67	12.27
Hydraulic plungers (12)	144.00	260.52	116.52
Tappet bodies (12)	300.00	482.66	182.66
Rocker arm shafts (12)	84.00	141.96	57.96
Main bearings, front (2)	54.00	83.46	29.46
Main bearings (6)	49.80	73.86	24.06
Oil pump impeller (1)	22.00	31.21	9.21
Counterweight bushings (8)	16.00	38.16	22.16
Counterweight washers (8)	20.80	32.24	11.44
	2,173.00	3,864.11	1,691.11

[1] 43 percent.

Mr. **Ireland**. Thank you, Mr. Dedmon. We all realize your statement had to be long; among other things, it helps us understand the background of the subject matter a great deal better and makes it possible to make the kind of decisions we ought to be making.

You mentioned a Texas solution. I thought you all just hung people from a tree down there.

Mr. **Dedmon**. Meet in the streets.

Mr. **Ireland**. Don't worry about hurting people's feelings. That isn't one of our charges or responsibilities here, worrying about people's feelings. We want to get to the heart of the problem.

I would assure you that the essential information that FAA said they were collecting and that was impossible for you to get under the Freedom of Information Act, we have obtained, although it is a year old. Unless there is an objection from the gentleman from Missouri, we will put it in the record and it will be available to one and all.

Mr. **Skelton**. Do you have an extra copy of that?

Mr. **Ireland**. Yes, indeed.

[The material referred to above follows:]

1 9 AUG 1961

AVS-130

ACTION: Obtaining Economic Impact Data Pertaining to the PMA Identicalness Issue

Chief, Aircraft Engineering Division, AWS-100

All Regional Flight Standards Divisions (except AAL, AEU, APC)
Attn: Chief, Engineering and Manufacturing Branch
Chief, Aircraft Certification Divison, ANW-100

We are in the process of evaluating the comments dealing with the identicalness issue raised by NPRM 77-19C (copy attached). The notice proposes a new system under which applicants for parts manufacturer approvals will certify that the parts they propose to manufacture are identical to type certificated parts. They would no longer submit design data on type certificated parts.

Executive Order 12291 and implementing DOT and FAA regulations require us to conduct an economic evaluation of this proposal. We believe the new system would have three main economic impacts; (1) you staff and other regional staffs which process PMA applications would have less workload since every application would no longer be reviewed for identicalness; (2) PMA applications would cost manufacturers less to prepare because applicants would no longer reproduce and submit design data on type certificated parts; (3) type certificate holders would face tougher competition in replacement parts markets because parts manufacturer approvals would be easier to obtain.

Your answers to the attached questionnaire are essential to help the Office of Aviation Policy and Plans prepare the economic evaluation for us. We realize that you have not been collecting the necesssary data to answer all the questions precisely. In such cases, please make reasonable estimates. Any comments in addition to your answers to the questions will be welcomed. We would appreciate receiving your response by September 18.

Original Signed by
J. M. CHAVKIN

Jerry Chavkin

Attachments
cc: AWS-1 (81-241)
100/130
AVS-20
APO-510
AWS-130:Akers:dmj:8/13/81:68395
ID: Corres. 3 - All/Reg/PMA
File No.Proj. 76-257-R

CONCURRENCES
RTG. SYMBOL AWS-130
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DATE 8/17/81
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DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CENTRAL REGION
601 EAST 12TH STREET
KANSAS CITY, MISSOURI 64106

DATE: September 18, 1981

IN REPLY REFER TO: ACE-211

SUBJECT: INFORMATION: Obtaining Economic Impact Data Pertaining to the PMA Identicalness Issue

FROM: Acting Chief, Flight Standards Division, ACE-200

TO: Jerry Chavkin
Chief, Aircraft Engineering Division, AWS-100

The "Questionnaire" (see Attachment 1) enclosed with AWS-100 letter dated August 19, 1981, has been addressed from an engineering viewpoint. Therefore, the information is based on actions taken by Engineering to approve type certification data.

fr Richard R
Joseph O. Gaul

Attachment

Attachment 1

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? 27 requests on data

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

   10.9 Professional hours

   1.5 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
6 Step	7 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? Travel to manufacturer facility - $1.00 per application

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
1	Professional hours	8
0	Clerical hours	1

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalnes provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	See No. 4
0	Other Non-Personnel $	0

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? None.

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

2	Standard letter or legal size pages and drawings.
1	Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

0%	"C" size drawings
50%	"D" size drawings
50%	"E" size drawings
0%	Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

2 FAA

2 The PMA Applicant

0-1 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). None - Engineering wise

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? None

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? None

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

0 test reports and computations

0 licensing agreement with the type certificate holder

18 showing identicality

As of September 3, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs. No comment.

ACE-211

F1-PT. -130
[illegible]

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

EASTERN REGION
FEDERAL BUILDING
JOHN F. KENNEDY INTERNATIONAL AIRPORT
JAMAICA, NEW YORK 11430

DATE: SEP 1 7 1981

IN REPLY REFER TO: AEA-218

SUBJECT: INFORMATION: Economic Impact Data Pertaining to the PMA Identicalness Issue; AWS-100 letter of 8/19/81

FROM: Chief, Flight Standards Division, AEA-200

TO: AWS-100
Attn: AWS-130

The data dealing with identicalness as delineated in NPRM 77-19C has been reviewed; the economic evaluation has been noted on the questionnaire forwarded to this office with the subject letter. The data has varied with the different sections within the Engineering and Manufacturing Branch, and our input reflects an average reasonable estimate and/or precise answers as applicable to all questions.

Raymond J. Borowski
for Brian J. Vincent

Enclosure

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? - (91)

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

   4 Professional hours

   1 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
7 Step	5 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? - NONE

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
2	Professional hours	2
0	Clerical hours	0

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	0
0	Other Non-Personnel $	0

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? - (90)

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

2 Standard letter or legal size pages and drawings.

5 Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

50% "C" size drawings

30% "D" size drawings

10% "E" size drawings

10% Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

3 FAA

3 The PMA Applicant

2 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). - (40%)

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? -(10)

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? - (1)

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

5 test reports and computations

8 licensing agreement with the type certificate holder

19 showing identicality

As of 9/1, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs.

AEA-218

1. **Parts that are similar to those produced under TSO should be tested to appropriate TSO test requirements.**
2. **Electrical/Electronic equipment - FAR 25.1359 Document #DO-160A.**
3. **Engine dynamic system parts - valve train, crank shaft, connecting rods, pistons, and accy. drive, and certain accessories such as magnetos, oil pumps, and starter generators.**
4. **Helicopter transmissions - gear box components, and accessories.**
5. **FAR 33.49 - Endurance Test.**
6. **FAR 27, 29.903 - Endurance Test.**

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

NEW ENGLAND REGION
12 NEW ENGLAND EXECUTIVE PARK
BOX 510
BURLINGTON, MASS. 01803

DATE SEP 17 1981

IN REPLY REFER TO ANE-213M

SUBJECT INFORMATION: Obtaining Economic Impact Data Pertaining to the PMA Identicalness Issue

FROM Chief, Flight Standards Division, ANE-200

TO AWS-100

In reply to your subject letter of August 19, 1981, we are attaching our completed questionnaire and offer the following comments, numbered in accordance with the listing in the questionnaire:

1. We have listed the quantity of applications received regardless of the number of parts for which approvals were requested. As an example, we received 1 application for approval of approximately 50 different parts used on about 10 different aircraft models. Also included in the quantity of 60 applications are requests from other regions for confirmation of identicalness of applications they have received.

4. While no costs other than engineering and clerical staff time have been listed, there are travel costs incurred by Manufacturing Inspectors in evaluating the manufacturing facilities and quality control systems of new applicants.

14. The quantity of 39 includes requests for confirmation of identicalness from other regions.

15. It is extremely difficult to make more than general comments in reply. Each part, for which an application is submitted, has to be evaluated individually taking into consideration previous service history, development history, use of new processes, materials or techniques, etc. These considerations are especially important in evaluating replacement parts used on engines.

Jack A. Sain

Jack A. Sain

Attachment

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? Approximately 60 applications

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

9 Professional hours

3 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
6 Step	5 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? None

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
0	Professional hours	7.5
0	Clerical hours	0

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	0
0	Other Non-Personnel $	0

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year?

Yes, spot chec

35

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

14 Standard letter or legal size pages and drawings.

4 Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

80 "C" size drawings

15 "D" size drawings

5 "E" size drawings

---- Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

5 FAA
2 The PMA Applicant
1 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). 8

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? None

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? None

14. How many applications for parts manufacturer approva ave you processed so far in 1981 by?

0 test reports and computations
3 licensing agreement with the type certificate holder
39 showing identicality

As of 8/31, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs.

ANE-313M

Service Life Limited Parts - Ref. FAR 27.571, 29.571, 33.14
Engine Rotating Parts - Endurance Test - Ref. FAR 33.87
- Overspeed Test - Ref. FAR 33.27
Turbine Rotating Parts - Overtemperature Test - Ref. FAR 33.27
- Overhaul Test - FAR 33.90
All Critical Parts - Tested per applicable regulations

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATIO

WESTERN REGION
P. O. BOX 92007, WORLDWAY POSTAL CENTER
LOS ANGELES, CALIFORNIA 90009

DATE: SEP 17 1981

IN REPLY REFER TO: AWE-218

SUBJECT: INFORMATION: Economic Impact Data Pertaining to the PMA Identicalness Issue; Ref: AWS-100 memo dated 8/19/81

FROM: Chief, Engineering and Manufacturing Branch, AWE-210

TO: Chief, Aircraft Engineering Division, AWS-100

In accordance with your request, the questionnaire relating to the subject matter has been completed and attached for your review.

The following is an additional comment for your consideration:

Manufacturing inspection specialist and associated clerical duties will increase significantly with implementation of the proposed new 21.302(a)(3)(i). The past identicalness review by engineering personnel involved considerations for data adequacy in producing duplicate parts (by virtue of comparison with approved data). The new 21.302(a)(3)(i) method for FAA acceptance of a "certification", and as stated in the NPRM, will necessitate an additional function by the manufacturing inspection specialist. Based on the FY-81 figures (10 projects), this would have required approximately 50 specialist hours and five (5) clerical hours. Therefore, it can be anticipated that with the predictable increase in applications under the new rule, additional resources will be required in the manufacturing inspection area.

FJKarnowski
F. J. KARNOWSKI

Attachment

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? 10

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

60 Professional hours

6 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
5 Step	3 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? None

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
8	Professional hours	52
0	Clerical hours	0

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	0
0	Other Non-Personnel $	0

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? 5 - 10

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

5 - 10 Standard letter or legal size pages and drawings.

3 - 10 Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

10% "C" size drawings

50% "D" size drawings

30% "E" size drawings

10% Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

8 FAA

7 The PMA Applicant

2 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). 5

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? 5

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? None

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

1 test reports and computations

81 licensing agreement with the type certificate holder

10 showing identicality

As of 9/14, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs.

AWE-318

Flight and navigation instruments, avionic and electrical equipment involving testing associated with compliance to FARs 23/25.1309 and .1351. Helicopter drive systems, engine components and accessories involving functional, endurance and fatigue testing associated with compliance to FARS 27/29.923.

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? 510

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

60 Professional hours

26 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
5 Step	5 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? NONE

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
12	Professional hours	2 TO 5
>1	Clerical hours	>1

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
—	Travel $	—
—	Other Non-Personnel $	—

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? IF RULES ALLOW US TO ACCEPT CERTIFICATION FROM APPLICANT, WE WOULD ONLY CONDUC RANDOM SPOT CHECK ON SMALL PERCENTAGE OF SUBMITTA

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

30	Standard letter or legal size pages and drawings.
45	Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

20	"C" size drawings
40	"D" size drawings
20	"E" size drawings
20	Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

2 TO 3 FAA
2 TO 3 The PMA Applicant
1 TO 2 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). 2 TO 3 TIMES THE CURRENT NO.

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? 20 TO 25

13. How many applications for parts manufacturer Approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? > 5

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

8 test reports and computations
5 licensing agreement with the type certificate holder
254 showing identicality

As of AUG., 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs. PROPOSED 21.302(b) SHOULD REMAIN. WHICH PARTS & WHICH TESTS WILL DEPEND ON ANALYSIS OF EACH PART AND RELATIONSHIP TO FARS 23,25,27,29 ESP. --.1309. TSO OR RTCA DO-160 COULD BE USED AS GUIDES TO TESTS REQUIRED. RELIABY TESTING COULD BE MODELED AFTER MIL-SPECS.

AGL-210

ADDITIONAL COMMENTS –
1. WHAT ASSURANCE PARTS ARE IDENTICAL
2. WHAT CONTROL OVER BOGUS PARTS
3. WHO DECIDES ACCEPTABILITY OF MAJOR/MINOR CHANGES

AWS-100

130

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

NORTHWEST REGION
FAA BUILDING KING COUNTY INT'L AIRPORT
SEATTLE, WASHINGTON 98108

DATE: SEP 16 1981

IN REPLY REFER TO: ANW-105

SUBJECT: ACTION: Obtaining Economic Impact Data Pertaining to PMA Identicalness
Issue: AWS-100 letter dated August 19, 1981

FROM: Chief, Aircraft Certification Division, ANW-100

TO: Chief, Aircraft Engineering Division, AWS-100
Attention: Chief, Systems Branch, AWS-130

Attached per your request are the forms transmitted with your August 19, 1981 letter. The data is compilation of that received from the Seattle Area and the Los Angeles Area Certification Offices.

Leroy A. Keith

Leroy A. Keith

Attachment

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? approximately 35

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

8 Professional hours

2 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical
13 Grade	5 Grade
5 Step	3 Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? approximately 25 miles travel via GSA vehical

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
1	Professional hours	7
-	Clerical hours	1/2

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
-	Travel $	100%
-	Other Non-Personnel $	-

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? about 50%

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

4 Standard letter or legal size pages and drawings.

3 Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

30% "C" size drawings

50% "D" size drawings

20% "E" size drawings

________ Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

2 FAA

2 The PMA Applicant

1 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). 1/3 more

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? 7

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? 16

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

4 test reports and computations

1 licensing agreement with the type certificate holder

9 showing identicality

As of September 1, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs. all parts should be tested to the extent required by the appropriate Federal Aviation Regulation (FAR 23, 25, 27, 29, 33, 34 or 35)

AVW-105

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

-130

AKers

DATE: SEP 15 1981

IN REPLY REFER TO: ASO-214

SUBJECT: INFORMATION: Obtaining Economic Impact Data Pertaining to the PMA Identicalness Issue

FROM: Chief, Flight Standards Division, ASO-200

TO: AWS-100

Attached is the completed questionnaire which provides information for use in preparation of the economic evaluation pertaining to NPRM 77-19C. If we can assist you further in this matter, please advise.

Fred G. Eick
for James E. Purcell

Attachment

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval? 100

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

3 Professional hours

.75 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional		Clerical	
13	Grade	5	Grade
1	Step	5	Step

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? No

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
15%	Professional hours	65%
0	Clerical hours	0

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	0
0	Other Non-Personnel $	0

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? 25%

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

10 Standard letter or legal size pages and drawings.

2 Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

60% "C" size drawings

40% "D" size drawings

0 "E" size drawings

0 Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

4 FAA

1 The PMA Applicant

0 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). 50% INCREASE

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? 5

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? 2

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

6 test reports and computations

0 licensing agreement with the type certificate holder

50 showing identicality

As of AUGUST 31, 1981.

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs.

ASO-214

ALL TURBINE PARTS SHOULD UNDERGO ENDURANCE TESTING TO PART 33, SUBPART F.

f 1~/PA -130

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ROCKY MOUNTAIN REGION
10455 EAST 25TH AVENUE
AURORA, COLORADO 80010

Akers

DATE: SEP 1 4 1981

IN REPLY REFER TO: ARM-210

SUBJECT: INFORMATION: Obtaining Economic Impact Data Pertaining to the PMA Identicalness Issue; AWS-100 (AWS-130) ltr dated 8/19/81

FROM: Chief, Flight Standards Division, ARM-200

TO: Jerry Chavkin
Chief, Aircraft Engineering Division, AWS-100

In reply to the request dated August 19, I would like to submit the attached information from the Engineering and Manufacturing Branch in the Rocky Mountain - Flight Standards Division.

Karl E. Robinson

Attachment

Questionnaire

1. How many applications for parts manufacturer approvals do you process each year that use a showing of identicalness under 21.303(c)(4) as the basis for approval?

2. On the average, how much staff time including preparation of correspondence is required to process an application for a parts manufacturer approval under the identicality provision?

12 Professional hours

3 Clerical hours

3. What are the average GS grades of the professional and clerical employees processing the applications?

Professional	Clerical	
14 Grade	4 Grade	**Note**: All identicality approvals handled by manufacturing inspection due to engineer shortage.
5 Step	1 Step	

4. Are any costs other than staff time incurred in processing the applications such as travel? If so, how much is spent on average per application? 0.1 hours travel.

5. Of the average staff time required for processing of an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4), how much is spent reviewing the design of the part that the applicant proposes to manufacture and how much is spent determining whether it is identical to a type-certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Proposed Part is Identical to a Type-Certificated Part
2	Professional hours	2
0	Clerical hours	0

6. How are the average, non-personnel costs of processing an application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) divided between review of the design of the applicant's proposed part and determining whether it is, in fact, identical to a type certificated part?

Reviewing Design of Applicant's Proposed Part		Determining if Applicant's Part is Identical to a Type-Certificated Part
0	Travel $	15.00
28.00	Other Non-Personnel $	35.00

7. If applicants for parts manufacturer approvals had to submit only certifications that their proposed parts are identical to type-certificated parts instead of design data for the type-certificated parts, would you request some applicants to submit design data on the type-certificated parts and actually check their applications for identicalness anyway? Approximately how many applications would you check per year? 5%

8. How many pages or drawings of design data on the type-certificated part, to which the part of an applicant for a parts manufacturer approval would be identical, are submitted with the average application for a parts manufacturer approval?

1 letter — Standard letter or legal size pages and drawings.

2 drawings — Large size pages and drawings.

9. Of the drawings on larger than legal size paper, what percents would you estimate are:

60 "C" size drawings

30 "D" size drawings

10 "E" size drawings

- Larger

10. How many pieces of correspondence in connection with an average application for a parts manufacturer approval under the identicalness provision of 21.303(c)(4) would you estimate are prepared by:

1 FAA

1 The PMA Applicant

1 The Type Certificate Holder

11. In your judgement, if applicants for parts manufacturer approvals had to submit only design data for their proposed parts and certifications that their proposed parts are identical to type-certificated parts to secure approvals, how many more applications would you process per year (not counting those which would no longer use the test and computation method). No change anticipated.

12. How many applications for parts manufacturer approvals do you process per year which use test reports and computations as the basis for approval? 162

13. How many applications for parts manufacturer approvals per year would you estimate would use test reports and computations as the basis for approval if approvals could be secured with only design data for the proposed part and a certification that the proposed part is identical to a type-certificated part? 162

14. How many applications for parts manufacturer approvals have you processed so far in 1981 by?

81 test reports and computations

4 licensing agreement with the type certificate holder

13 showing identicality

As of Sept. 11, 1981.

ARM-310

15. In your judgment, if the environmental or endurance test requirement of the NPRM (proposed section 21.302(b)) remains in the final rule, which parts should be tested and which tests should be performed on each part? Identify the tests by reference to appropriate sections of the FARs.

FARs 27.923
29.923

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHWEST REGION
P. O. BOX 1689
FORT WORTH, TEXAS 76101

DATE: SEP 10 1981

IN REPLY REFER TO: ASW-212

SUBJECT: INFORMATION: Economic Support Data Pertaining to the PMA Identicalness Issue, NPRM 77-19C, AWS-100 Ltr of 8/19/81

FROM: Chief, Flight Standards Division, ASW-200

TO: Jerry Chavkin
Chief, Aircraft Engineering Division, AWS-100

This letter is in response to the Questionnaire forwarded by your letter of August 19, 1981, subject as above.

Not all PMA's are handled the same in this region, as is probably the case in all regions. The principal categories are as follows:

a. PMA's that must be forwarded to other regions for review are handled essentially administratively. Most of the propulsion system related PMA's fall in this category.

b. Many PMA's in this region are applied for subsequent to issuance of an STC. This is a result of the STC holder's desire to manufacture for sale parts or kits approved under the STC without having to obtain FAA conformity on each part or kit. No engineering effort is expended on this type PMA because the engineering effort is all conducted relative to issuance of the STC.

c. The category of PMA apparently principally addressed by the NPRM can also be discussed in two parts:

   (1) The type PMA that could be handled as apparently envisioned by the NPRM without causing undue concern to us is the one where the applicant is, in fact, the original manufacturer and/or supplier through a major airframe manufacturer, wherein the part was certified as part of a Type Certification program by the major airframe manufacturer. We could accept the applicant's design data and certification of identicality for this type PMA without serious concern about compromising airworthiness standards.

   (2) The type PMA that might not work well if this NPRM is adopted is the one where an applicant was not the original manufacturer or supplier, and may or may not in fact have access to all of the TC holder's design drawings, procurement specifications, process specifications, performance specifications, and qualification test requirements. The applicant may, through ignorance, be willing to certify identicality even though he may not possess adequate data to truly determine identicality. As the NPRM is now written,

the intent, as stated in the discussion section, is that the FAA "would accept . . . without further data comparison prior to approval" the data and certification statement of identicality. With regard to question 7, presuming that we would continue to review the data regardless of the intent of the NPRM, the extent of review would depend to a great extent on our previous experience, if any, with the applicant and on the type component for which a PMA is requested. For a new applicant, we would continue to independently determine identicality until the manufacturer's reputation has been established. For an established applicant with a satisfactory history of performance, an occasional spot check would be all that is necessary.

Because we felt it necessary to expand on several answers in the questionnaire, we are listing our answers below instead of filling out the original format:

Question Number and Summary	Handled Entirely Within SW Region	Sent to Other Regions for Review
1. Number of PMA Applications	27	100 (Primarily Propulsion)
2. Staff Time per Application		
Professonal (hrs)	7.2	.25
Clerical (hrs)	1.0	.10 (Transmitted on form letter)
3. Average Grade		
Professional Grade	13	14
Step	6	8
Clerical Grade	5	5
Step	6	6
4. Costs other than staff time such as travel	negligible	none
5. Review of Application		
Design Identicalness		
% Professional %	5% 95%	0% 0%
% Clerical %	0% 0%	0% 0%

Question Number and Summary	Handled Entirely Within SW Region		Sent to Other Regions for Review	
6. Non-personnel costs				
Design Identicalness				
___ Travel ___	none	none	none	none
___ Other ___	none	none	none	none
7. Even if certification statement allowed, would you require some applicants to submit TC design data anyway?	Yes (see discussion in letter)		No (decision of reviewing region)	
8. How many pages or drawings of design data on the TC part are submitted with average application for PMA?				
Standard or legal	*62		2	
Larger	2.3		2	

*The applicant is not required to submit frequently referenced specifications if they are readily available in our files.

Question Number and Summary	Handled Entirely Within SW Region	Sent to Other Regions for Review
9. Larger Pages & Drawings Breakdown (%)		
C size	25%	50%
D size	50%	50%
E size	24%	
Larger	1%	
10. Pieces of correspondence in connection with average application?		
FAA Prepared:	2.2	4
PMA Applicant Prepared:	2.0	2
TC Holder Prepared:	0.0	0

Question Number and Summary	Handled Entirely Within SW Region	Sent to Other Regions for Review
11. If no TC data required, how many more applications a year would applicants submit for approval under identicalness provision?	0	0
12. How many applications per year are processed which use test reports and computations as basis for approval?	0	5
13. How many applications for PMA per year would use test reports and computation as the basis for approval if approval could be obtained with design data and certification?	0	5
14. How many applications for PMA were processed in 1981 as of September 1 by:		
Test Reports and computation	0	3
Licensing agreement	0	0
Showing identicality	14	60
ASW-212 15. If the environmental or endurance test requirement remains in the final rule, which parts should be tested and which tests should be performed on each part?	See discussion below	

With reference to question 15, the definition given in the NPRM, paragraph 21.302(b), is a good general guideline. The requirement to test would also depend on whether or not an applicant came under subparagraph c(1) or c(2) of our letter:

a. If an applicant was in fact the original manufacturer, although not the TC holder, he should not be required to test unless he has made significant changes in the design.

b. For environmental tests, the applicant should be required to perform environmental tests on those parts that are made of different materials and/or have different protective finishes from the TC parts unless experience has shown his design choice reliable.

c. As far as endurance tests are concerned, the following criteria is suggested for manufacturers producing a part for the first time: Each PMA part that originally required an endurance and/or fatigue test as part of the certification program and whose failure would preclude continued safe flight and landing or would result in serious injury to any occupant, should undergo the same or equivalent tests as the TC part.

Philip R Cramer
for Roger G. Knight

Mr. IRELAND. Mr. Dedmon, concerning an item that had Mr. Skelton's interest, the differential in price between the OEM and the PMA parts, has that been something that is just recent or is it something that has been going on for a number of years?

Mr. DEDMON. No, sir. The differential in selling price by independent small PMA suppliers and the OEM's has been going on for a number of years.

Mr. IRELAND. A good deal of the cause for this is that the OEM's in a competitive nature are cutting their overall prices and in your view they are trying to make it up on replacement parts.

Mr. DEDMON. Yes, sir. There is a very competitive market in the sale of aircraft engines to the airframe manufacturers and it is our understanding that the profit margin on engines sold as OEM's to those airplane manufacturers is very small. However, because there is a restricted market after the engine is installed, the profit margins on parts sold are considerably greater.

Mr. IRELAND. I see. Am I correct that a PMA's certificate cannot be obtained unless you have an approved fabrication inspection system? In other words, that is not at issue.

Mr. DEDMON. Yes, sir. A fabrication inspection system spelled out under part 21 of the Federal aviation regulations is an absolute requirement to get a parts manufacturer approval.

Mr. IRELAND. In your view and the view of other PMA's, it has been working properly, there is no controversy over that.

Mr. DEDMON. No, sir. We are not unhappy with the way the rule is currently written, either for obtaining design approval or with the fabrication inspection systems. We, of course, would like to see certain changes in the way the rule itself is administered, more standardization. However, the current rule is not under attack by PMA holders.

Mr. IRELAND. You know, the strange thing about this whole affair is that no one seems to come forward with any straightforward need for this regulation. To the public's mind, obviously, the important thing is safety and, yet through your testimony, and the testimony and comments by the Justice Department and the FAA itself, there is no argument at all that there is a need for this regulation based on safety.

Mr. DEDMON. I haven't seen it.

Mr. IRELAND. Over this period of time that you describe and other efforts, this didn't involve safety either, right?

Mr. DEDMON. That is correct.

Mr. IRELAND. We still haven't gotten to the need for this regulation.

Mr. DEDMON. I want to make clear to the committee it is not my personal allegation the FAA is involved in trying to eliminate competition. I do not challenge the FAA's stated intent that they are trying to improve the situation. We have worked for years with the FAA. We have a great number of people that we consider friends within the FAA. We have always had an open, communicative, helpful relationship from the FAA. It is more accurate to state our position is that the stated intent of the FAA is incorrect, that the rule itself will not do what they intend for it to do.

Mr. IRELAND. Mr. Skelton.

Mr. SKELTON. Mr. Dedmon, you have made some rather serious allegations. In your testimony you referred to "they" as I suppose the OEM, "They used strong-arm tactics and the Federal Aviation Administration to do their dirty work." You said that.

Mr. DEDMON. That is correct, sir.

Mr. SKELTON. Now, would you please list for me the strong-arm tactics that they used?

Mr. DEDMON. Mr. Skelton, we have been since 1969 under constant attack by the OEM's. We have had pressure put on our vendors to stop manufacturing for us. We have been the victims of product disparagement in the marketplace. We have seen discriminatory practicing. We have seen attempts to forbid customers to buy our parts through threats of withholding warranties on engines. We have seen the actions that I previously indicated with regard to the FAA regulations. I would point out that all of this has been outlined in the form of antitrust litigation which Superior Air Parts filed in——

Mr. SKELTON. That is what I was going to say. All of these give you cause for action. It sounds like pretty serious cause for action. Am I correct?

Mr. DEDMON. Yes, sir, Mr. Skelton.

Mr. SKELTON. How many lawsuits have you filed?

Mr. DEDMON. In September of 1976, Superior——

Mr. SKELTON. Just answer my question. How many lawsuits have you filed?

Mr. DEDMON. One.

Mr. SKELTON. One. How many allegations? You listed about five, if I counted them correctly, five strong arm tactics, each of which is a Federal violation or at least a violation. Did you list those as a count in your lawsuit?

Mr. DEDMON. Mr. Skelton, I will be quite honest with you and since I am not a lawyer, I am not sure exactly what the number of specific allegations——

Mr. SKELTON. Can your lawyer, Mr. Beckman, answer that, sir?

Mr. **Beckman**. Yes, sir. All of these were alleged in the complaint.

Mr. **Skelton**. Five allegations, if I count correctly?

Mr. **Beckman**. There were more than five allegations.

Mr. **Skelton**. All right. How many were there?

Mr. **Beckman**. I cannot remember.

Mr. **Skelton**. Well, a good handful?

Mr. **Beckman**. A good handful.

Mr. **Skelton**. These strong arm tactics, for lack of a better phrase, all of these were listed in your lawsuit, is that not correct?

Mr. **Beckman**. Yes, sir.

Mr. **Skelton**. Did you have a trial?

Mr. **Beckman**. No, sir. The case was settled satisfactorily.

Mr. **Skelton**. Were these allegations for damages?

Mr. **Beckman**. Oh, yes.

Mr. **Skelton**. It was settled?

Mr. **Beckman**. Yes, sir.

Mr. **Skelton**. Who were the plaintiffs and the defendants?

Mr. **Beckman**. The plaintiffs were Superior Air Parts and the defendants were Avco-Lycoming, Teledyne Continental Motors, Sealed Power Corp., TRW and Burgess-Norton Division of Amsted Industries.

Mr. **Skelton**. So, there was a settlement on behalf of the defendants?

Mr. **Beckman**. All defendants settled satisfactorily.

Mr. **Skelton**. All right.

Now, going back then, Mr. Dedmon, you say the Federal Aviation Administration does the dirty work. Now, you had better explain that.

Mr. **Dedmon**. OK. As I mentioned in my testimony, the 1969 rulemaking effort was a direct response to a petition from Pratt & Whitney, who is an OEM. The manufacturing requirement that was interpreted upon Superior Air Parts and other PMA manufacturers was the direct result of the Carneal-Turner letter exchange and subsequent to that we became aware of intense pressure from George Carneal on the southwest region, which has oversight over Superior Air Parts to withdraw our operating certificate and put us out of business because of being in violation of this interpretation.

Now, I can't give you hard evidence from 1975, or in NPRM 77-19 that these rulemaking proceedings were instigated directly as an effort by the OEM's. It is possible, maybe probable, that 77-19 and 77-19C are merely a bureaucratic snowball. It seems like this rule now has obtained a life of its own since I came to work for Superior Air Parts in 1969. This rule has been under constant assault and study by the FAA. I can assure you that whatever inspired 77-19 and 77-19C that it was not inspired by PMA holders.

Mr. **Skelton**. Well, does your statement that the FAA is doing the dirty work apply since 1975?

Mr. **Dedmon**. Well, as I stated, I don't know that the results from 1975 on are the result of——

Mr. **Skelton**. So, your statement then that the FAA does the dirty work applies at least up to 1975, is that correct?

Mr. DEDMON. It is my statement that, yes, sir, that 1969 and the efforts in 1973 are the results of the OEM's attempting to use the FAA regulatory process to put Superior Air Parts out of business and other independent parts manufacturers.

Mr. SKELTON. Now, you have some parts here that show a great disparity in price. This obviously concerns me and the reason I asked the question awhile ago what percentage of business goes to the Federal Government, I would like to know, particularly the military aircraft and all governmental aircraft purchases. This concerns me a great deal.

Mr. IRELAND. Excuse me. If the gentleman will yield a minute, so you will know, the staff tells me that one of our witnesses has some detail in his report on that and we will have a request into the GAO to get you some additional information along that line. They will probably have more access than Mr. Dedmon.

Mr. SKELTON. I appreciate that very much.

One of my two last questions, the parts that you show us with the great disparity in prices, is this an example that sticks out like a sore thumb or is this reflective of nearly all the parts that are manufactured?

Mr. DEDMON. I would have to say that it is representative, but it does not stick out like a sore thumb. When I prepared to testify, I wanted to bring a dramatic example that I could hand. On the other hand, it is not the most dramatic because there were other parts that I——

Mr. SKELTON. Could you list them? How many parts are you talking about that are involved? Hundreds, I suppose.

Mr. DEDMON. Well, exhibit A and exhibit B in my written testimony outline a number of items, not by specific part number, which would possibly be meaningless to this subcommittee, but by description, and now these indicate prices to independent overhaulers. However, I am prepared at this point——

Mr. SKELTON. This answers my second question. Thank you.

Mr. IRELAND. Mr. Dedmon, what happens if the type certificate holder refuses to provide the design information to the FAA? Am I clear about that?

Mr. DEDMON. Yes, sir. I understand the question. I am not sure what remedy the FAA has to enforce that. It is my understanding that the type certificate holder's approved data must be made accessible to the FAA.

Mr. IRELAND. We would all think so. We hope so anyway.

Mr. DEDMON. Yes, sir.

Mr. IRELAND. Further in your prepared statement, you explain that the FAA cooperates with the original equipment manufacturers and tells them where their designs are deficient. How does that operate?

Mr. DEDMON. Well, the FAA has consistently through the years worked with industry to help improve products. That is what the FAA is supposed to do, to help develop safe products to work with certification of aircraft, and aircraft engines in products. If, for example, you are conducting an engine test, the FAA will help you design the criteria under which that engine test should be conducted, stating the things that need to be proved, pointing out the shortcomings and the airworthiness problems and so forth.

Mr. **Ireland**. Is that kind of consultation available to PMA's?

Mr. **Dedmon**. Not in the original design approval information. Under the current methods, design data is submitted to the FAA and they conduct an examination of the design data to see it meets the equivalent airworthiness of a type certificate holder's product. If it meets that criteria, it is stamped as approved. The PMA holder may then manufacture that product. If it is rejected, the information is sent back to the PMA applicant with a statement that it does not meet those requirements. There is no indication as to what the PMA holder or PMA applicant must do to meet those requirements.

Mr. **Ireland**. I see, sir. You believe that the administrative burdens under this will be increased for applicants and holders. Can you elaborate.

I am not clear whether it is a matter of burdens being increased under the regulation or simply just wiped out so you can't perform or is it a combination of both under 77–C?

Mr. **Dedmon**. Well, the end result is that we will not be able to perform. The administrative burden on the PMA holder will be an impossible administrative burden because we will have to supply information that is not available to us and the FAA will be then subjecting us to a standard which is not a public standard or which they will at least not make public to us.

Mr. **Ireland**. Mr. Skelton, do you have further questions?

Mr. **Skelton**. No, thank you.

Mr. **Ireland**. Mr. Dedmon, again, we thank you for your elaborate testimony and your willingness to be here. Thank you very much.

Mr. **Dedmon**. Thank you very much.

Mr. **Ireland**. Mr. Larry Manhan, president of Execuair in Canoga Park, Calif. Mr. Manhan, your very supportive Congressperson, Ms. Fiedler, wanted to be here to introduce you with some praiseworthy remarks, but she had to be elsewhere in the Capitol. She sends her regrets, but we will note her comments in the record. We are delighted you are here.

TESTIMONY OF LARRY S. MANHAN, PRESIDENT, EXECUAIR CORP., CANOGA PARK, CALIF.

Mr. **Manhan**. Mr. Chairman and members of the subcommittee, thank you for inviting me here to testify. I have come from Los Angeles at my own expense because of the importance of this committee's hearing. I, and many other small businesses like mine engaged in the aircraft and engine parts replacement industry, are facing ruin if the FAA goes forward with the pending rule this committee is examining.

Let me first describe my small company. Execuair has been in business since June 1956 in the supply of aircraft components and accessories. In 1970, we became a FAA repair station 417–25 and are specifically certified to repair and overhaul Whittaker manufactured equipment and related hardware. We are specialists in the Whittaker products. Our repair station authorization is only to Whittaker equipment.

For 20 years prior to 1977 we had been dealing in Whittaker parts. Whittaker decided to crush us. First, they told the vendors who sold parts both to Whittaker and to ourselves that if the vendors sold to Execuair, Whittaker would not deal with them. This cut off our source of supply. Second, Whittaker launched a massive legal assault claiming invasion of trade secrets, trademark and copyright infringement, and unfair competition. So far, Whittaker has lost every round of the lawsuit, but they now have us tied up on appeal. The effect of this assault was devastating. Prior to the lawsuit, we had 30 employees and were doing business with the commercial airlines worldwide, performing overhauls for commercial airlines and supplying parts to the U.S. military. After the assault, we had to let go all but six employees and I assure you we are struggling for survival. Our gross sales dropped 80 percent in the 1977-78 timeframe and we have fought hard and are now back to about a 40 percent level prior to 1977.

Our prices for identical parts are much lower than Whittaker's. I have been asked why airlines and the Government will pay so much more for an identical part from Whittaker compared to buying the same part at a much lower price from Execuair. The answer does not lie in any cost difference. Whittaker and Execuair use essentially the same manufacturing processes and the same quality control and inspection procedures. Indeed, in some cases both Whittaker and Execuair buy a part from a specialized manufacturer, such as a ball bearing, and we both pay the approximate same price. To stay with the ball bearing illustration, New Hampshire Ball Bearings sells bearings to Whittaker and to Execuair for $3.10. We sell the ball bearing for $6.50. Whittaker sells them commercially to the airline industry for $10.69, but sells them to the U.S. Government for $75 each.

I have a couple of the samples that I would like to pass out for your review. Another example that I would like to illustrate is a butterfly disk used on the B-52, as well as the DC-8 and 707. Whittaker sells the disk to the Air Force for $40.15, sells it commercially for $24.53. The tragedy of this disk is that on six contracts Whittaker sold a total dollar value of $170,000 to the Government at their Government contract price. Had the Government been charged the airline price, they would have paid $115,000, a clear overcharge of $54,000. The cost to package this disk is 38 cents each as of June 1982.

On two of the six contracts we were competing and it took us from May 1980 to January 1982 to be certified by the Air Force, even though we have PMA on the item. On those two contracts that we were precluded from bidding, Whittaker sold the same disk to the Government for $81,800 and the commercial list price for the same item was $49,992, a clear overcharge of $31,000. Had Execuair been allowed to bid that item to the Air Force, our total sales price for that quantity would have been $28,817.

We have been successful in securing one contract in January 1982 for 1,800 of the same part at $14.14.

[Contract award referred to above follows:]

OFFEROR MUST COMPLETE ALL PROVISIONS REQUIRING FILL-IN

CAUTION: FAILURE TO COMPLETE APPLICABLE PROVISIONS WILL CAUSE A DELAY IN THE AWARD OF A CONTRACT.

SECTION B - SUPPLIES/SERVICES AND PRICES

B-1. CONTRACT LINE ITEMS:

NOTE: The delivery date(s) set forth herein are required in support of the Air Force mission. Your offer is to be submitted to achieve the required delivery. Offerors are advised that the Government reserves the right to make an award to other than low offeror to achieve the delivery schedule that is in the best interest of the Government, price and other factors considered.

ITEM NO	SUPPLIES/SERVICES	QTY UNIT	UNIT PRICE	AMOUNT
0001	NSN: 2995 00 315 7011HB NOUN: Disk P/N: 109498 &/or E-109498 APPL: J57 Engine MMFC: 050850 FOB: Origin POA/INSP SITE: Origin ACCEPTANCE SITE: Origin QTY VAR: NONE	1,803 ea	14.14 EA	25,494.42

EXECUAIR P/N E-109498
QUOTED.

ACRN: AA
PR: FD2030-82-24925

SHIP TO: Transportation Officer Code: FB2039
Tinker AFB OK 73145
M/F: Acct 09
Contract No E34601 82-C-1938

MILSTRIP DATA: NONE

Delivery based on (✓) Routine ( ) Premium. Premium Cost, if any, is $__________ included in the price quoted above and resulted in _______ days delivery improvement over Routine Delivery.

SECTION C - DESCRIPTION/SPECIFICATIONS

SECTION D - PRESERVATION, PACKAGING, PACKING AND MARKING

D-01. Preservation, Packaging, Packing and Marking shall be performed in accordance with the following documents and instructions, attached hereto and made a part hereof:

(a) AFLC Form 873, Preservation, Packaging and Packing Requirements (81 FEB), 2 pages.

(b) AFLC Form 53, Item Identification Marking and Shelf Life Item Provisions (80 NOV), 1 page.

SECTION E - INSPECTION & ACCEPTANCE

E-01. INSPECTION AND ACCEPTANCE POINTS:

See Section F, hereof

E-02. INSPECTION SYSTEM/QUALITY PROGRAM FOR NEW MATERIAL:

a. The Contractor shall maintain an Inspection System/Quality Program in accordance with General Provisions Clauses in Section I hereof which are applicable to this contract.

SECTION F - DELIVERIES OR PERFORMANCE

F-01A. TIME OF DELIVERY

a. REQUIRED DELIVERY SCHEDULE

Delivery shall be in accordance with the following schedules:

ITEM	QUANTITY (on or before the date(s)	TIME specified below)
0001	406 ea	82 MAY
	406 ea	82 JUN
	330 ea	82 DEC
	330 ea	83 JAN
	331 ea	83 FEB

Mr. MANHAN. Another example is the baseplate, which is used in a number of actuators used on a number of various aircraft. Whittaker sells these to the Air Force at $115 each or commercial airlines at $39 each. We have PMA on the item and we advertise and sell it worldwide for $17 each.

How can this go on? The answer is market power. Whittaker has 90 percent of the market. They control the price. In addition, and this is all laid out for the record in our own antitrust lawsuit against Whittaker, Whittaker has engaged in calculated, destructive tactics.

One, Whittaker has sent false letters to airline customers and to the Government saying that our parts are inferior. They have even been on record telling the Air Force that they would gladly inspect at no charge any parts Execuair supplies the Air Force. Several depositions were taken at Kelly AFB and Tinker AFB to date.

[Documents referred to above follow:]

14-602 Federal Aviation Administration. Under Public Law 85-726 (72 Stat. 776, 49 U.S.C. 1423), the Federal Aviation Administration (FAA) has certain responsibilities and prerogatives in connection with the issuance and continuation of various certificates applicable to the design, manufacture, and airworthiness criteria of certain types of commercial aircraft and of aircraft equipment and accessories. The FAA evaluations are not a substitute for normal Department of Defense evaluations of the contractor's quality assurance measures. Actual records of such FAA evaluations may be of benefit, however, and should be utilized to maximum advantage by the contract administration office. That office is responsible for assuring that the supplies and services conform to the terms of the contract and that any required certificates and approva' e in the possession of the contractor prior to acceptance.

14-603 Quality Assurance Among NATO Countries. The NATO Standardization Agreements (STANAG) 4107—Mutual Acceptance of Government Quality Assurance sets forth procedures, terms and conditions under which mutual government quality assurance of military material and services is to be performed by the national authority of one NATO country on request of another NATO country, or a NATO organization. This agreement, with certain reservations, has been ratified by the United States and other nations in the North Atlantic Treaty Organization. The Military Departments may request NATO countries to perform quality assurance in accordance with STANAG 4107. They will also perform quality assurance in accordance with STANAG 4107, if requested. As a reservation to STANAG 4107, the U.S. Government requires reimbursement for work performed for other NATO countries. Paragraph 20-506 applies.

14-603.1 *NATO Quality Control System Requirements for Industry.* The NATO Standardization Agreement (STANAG) 4108—NATO Quality Control System Requirements for Industry AQAP-1 sets forth details of an agreement among NATO Nations with an objective to standardize the application of Allied Quality Assurance Publication No. 1 (AQAP-1). In accordance with STANAG 4108 participants agree to:

- (i) encourage suppliers of defense materiel and services to establish Quality Control Systems in accordance with the principles outlined in AQAP-1;
- (ii) consider compliance with AQAP-1 a basic factor when selecting suppliers of defense materiel in NATO cooperative projects;
- (iii) use AQAP-1 as a guide for evaluating a supplier's Quality Control System when so requested by another NATO country, which is considering placing a contract with that supplier.

This agreement has been ratified by the United States and other nations in NATO. The Military Departments may request NATO Nations to assure com-

WHITTAKER CONTROLS

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JOSEPH W. STEVENS
President

Whittaker

October 30, 1978

Attendees
Airline Transport Association Conference
Kansas City, MO

Subject: Sale of Bogus Parts to Airlines
(Summary of Certain Aspects of the
Whittaker vs. Execuair Litigation)

Gentlemen:

1. Whittaker has manufactured valves and actuators for aircraft since 1942.

2. The Execuair company, or its affiliate EMC, has never been an authorized agent or distributor for Whittaker. Whittaker has never authorized Execuair to use any of Whittaker's manufacturing drawings or data.

3. Prior to June, 1968 the Execuair company represented itself as being an agent of Whittaker. Whittaker sued and a permanent injunction was entered enjoining Execuair from engaging in the activities as specified in that injunction.

4. As an example of the problems Whittaker has been faced with, in 1977 Ozark Airlines rejected to Whittaker certain valves which had been sold (it turned out) by Execuair to Ozark as NEW. The valves were not new, and they contained bogus parts. Ozark believed that it was getting new or unused ATA surplus valves. Execuair insists (in the court documents) that Ozark got what it asked for--a new valve. Execuair's position is contradicted by the fact that the valve contains bogus parts.

5. In August, 1977 Whittaker sued Execuair, claiming, among other things, that Execuair was palming off its parts as those of Whittaker and using Whittaker's trade secrets. After some legal sparring, a preliminary injunction was entered requiring Execuair to indicate that its parts were MANUFACTURED BY OR FOR EXECUAIR AND NOT BY WHITTAKER.

6. The FAA requires that replacement parts sold for use on type certificated products be supplied to airlines by the OEM or the holder of a PMA and that the parts be marked FAA-PMA. For some years Whittaker has sold FAA-PMA parts to the airlines.

7. After the lawsuit began in 1977 Execuair started applying for PMA on certain Whittaker parts. The first PMA Execuair got was after May 24, 1978, on approximately 17 parts out of 60 requested. In each case Execuair submitted a copy of a Whittaker drawing and another copy of the same drawing with an Execuair sticker on it. Execuair does not admit that it has done wrong. However, Execuair does concede that it has copied Whittaker drawings. Whittaker has claimed and continues to claim that such activity, among other things, is illegal. Unfortunately, the FAA does not concern itself with the authority of the applicant to use the "identical" drawings.

8. FAR Section 45.15 requires that each part be marked to show that it is FAA-PMA and the application for the part. A quick check of the parts should reveal compliance.

CONCLUSION

While no one can accurately predict the results of litigation, Whittaker is very optimistic that it will win this case.

Very truly yours,

Joseph W. Stevens

Whittaker

BRUCE L. RICHARDS, Manager Airlines Sales

WHITTAKER CONTROLS

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March 15, 1979

Members of the CCMA
Spring Conference 1979
Guadalajara, Mexico

Subject: Litigation Between Whittaker Controls and Execuair Co.

Gentlemen:

In December, 1977 we wrote you that we had begun new litigation against Execuair which accuses them of trademark infringement and of misrepresenting its products as those of Whittaker. Background and current status is as follows:

1. Neither Execuair nor any of its affiliates: EMC Co., Titan Pump, nor any other concern owned and operated by Mr. Larry Manhan, has ever been an authorized outlet for Whittaker parts. Whittaker has never authorized any of these companies to use any of Whittaker's manufacturing drawings.
2. In 1968 Whittaker filed suit against Execuair, and a permanent injunction was issued by the court preventing Execuair from representing themselves as authorized agents of Whittaker.
3. An example of more recent problems was in 1977 when Ozark Airlines rejected certain valves to Whittaker. These valves were discovered to have been sold by Execuair as NEW. They were not new and, in fact, contained parts not manufactured by Whittaker.
4. As a result of our present litigation, a preliminary injunction has been issued which requires Execuair to indicate that its parts are "MANUFACTURED BY OR FOR EXECUAIR, NOT BY OR FOR WHITTAKER."
5. The FAA requires that replacement parts supplied to airlines be manufactured by the Original Equipment Manufacturer, the holder of the Type Certificate or by the holder of an FAA-PMA.
6. Execuair applied for FAA-PMA on certain parts for Whittaker valves only after the present litigation began. The first PMA was granted on May 26, 1978. This application and subsequent Execuair applications for FAA-PMA have been accomplished by submitting Whittaker blueprints over which Execuair has actually pasted its own title block. The Whittaker blueprints submitted by Execuair are mostly not current and all were acquired without the consent of Whittaker. Whittaker claims that such unauthorized use of our intellectual property is illegal. Unfortunately, the FAA regulations covering PMA by identicality did not foresee the unauthorized use of drawings, and the FAA does not concern themselves with the right of applicants to possess such data, which is why Whittaker has sued Execuair in a court of law.

OBJECTIVES AND BELIEFS

Whittaker seeks, in its litigation, to permanently prevent Execuair from using Whittaker drawings (developed at Whittaker's expense) to manufacture parts for Whittaker valves (qualified on your aircraft by Whittaker). We believe that the drawings are our property, and that their unauthorized use by Execuair constitutes theft of trade secrets.

Whittaker seeks to permanently prevent Execuair from representing its products as Whittaker's. You, our customers, are entitled to this protection.

Whittaker seeks, in its litigation, to expose, by sworn testimony, a practice by Execuair of manufacturing parts for use in Whittaker valves and in misrepresenting these newly created parts as unused Whittaker surplus. We believe that you, our customers, are entitled to know that this practice has existed.

Execuair, even in its present posture as a PMA manufacturer, does not truly and faithfully represent its product, since it has used mostly Whittaker drawings originally created in the 1960's for its PMA applications. Under the FAA regulations such PMA designs are frozen, and Execuair is thus able only to supply components which lack the many years of constant improvement which separate Whittaker's 1960 product from its current production.

We advise that before buying products at "apparent" substantial cost savings that consideration be given to the potential substantial hidden costs of higher maintenance and other problems for parts not supplied by the original equipment supplier.

Finally, we believe that it is our obligation to insure that you have the complete picture so that you may make your buying decisions based on factual knowledge rather than assertions that Execuair sells Whittaker parts at substantial savings. The facts are:

a. Execuair sells Execuair parts--not Whittaker approved parts.

b. Whittaker has engineering and quality control data available from the Boeing Airplane Co. and Pratt & Whitney Aircraft which Execuair does not have. Execuair has absolutely no approval from either of these companies to produce Whittaker valves.

c. Execuair has had no legitimate access to Whittaker design improvements over a period of many years, and, in fact, has no legitimate access to Whittaker drawings or design engineering documentation of any kind.

d. Whittaker cannot accept any warranty obligation whatsoever for the performance of any part manufactured by Execuair.

e. Execuair, EMC, and Titan Pump are all corporations owned by Mr. Larry Manhan and are essentially synonymous.

CONCLUSION

While no one can accurately predict the results of litigation, Whittaker Controls is very optimistic that this case will come to trial in 1979 and that we will win this case. If there are any questions concerning this matter, please do not hesitate to contact Whittaker Controls.

Whittaker

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Whittaker

April 1, 1981

Directorate, Procurement & Production
Department of The Air Force
San Antonio Air Logistics Center
Kelly Air Force Base, Texas 78241

Attention: Kathy Burke/PMWPB

Subject: FD2050-81-75921, Whittaker Controls P/N 132002 Shaft

Reference: (a) Whittaker Quote No. 1577
(b) Kelly AFB letter dated 20 March 1981
(c) Discussion J. Sarge/K. Burke 27 March, 1981

Dear Ms. Burke,

This is to acknowledge receipt of the reference (b) letter notifying us that the procurement of 150 shafts on the subject solicitation was awarded to another company. Also, confirming our discussion, it is understood the award was made based upon Whittaker manufactured surplus hardware.

Again, we must question the validity of 150 shafts being available on the surplus market in new unused condition. To accumulate this quantity of shafts, it is our belief they would have to be removed from valves delivered by Whittaker during the early 1960's, and would not be considered as new unused.

Since this is our product and we have the latest change drawings, this letter is to formally request that a representative from Whittaker Controls be present at Kelly Air Force Base to participate in the inspection of the shafts when they are received.

We await your comments as to when the units will be available.

Very truly yours,

E.J. Sarge

E. J. Sarge
Contracts Administration Manager

EJS/tp

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12833 Saticoy Street
North Hollywood, California 91605
213/765-8160

September 4, 1981

Whittaker

TO WHOM IT MAY CONCERN:

Subject: Whittaker vs. Execuair Litigation
Concerning Bogus Parts, etc.

Execuair Co. has pronounced itself "the winner" of the subject lawsuit and Whittaker "the loser." To set the record straight, we would like to state unequivocally that this litigation is not over--indeed, court rulings have prevented Whittaker from presenting the evidence we consider necessary to our case.

This evidence, including actual parts, documents, and testimony from airline officials, would show that Execuair misused the Whittaker trademark and palmed off parts it manufactured as Whittaker parts. Accordingly, we have proceeded to the appellate level, and our appeal has been filed with the United States Court of Appeals. We feel that the lower court's ruling which restricted the evidence we can present will be reversed, and once the evidence can be heard, we are confident Whittaker will prevail.

This letter is to tell you that it is our firm decision to pursue the issues in this case to the full extent of the law. For those of you who have encouraged Whittaker to take this matter to the courts, we can only advise litigation takes a great deal of time and patience.

Meanwhile, you can be sure that Whittaker Controls will continue to provide a product produced to the latest design configuration and manufactured to stringent quality control requirements with both field service and engineering to support our product worldwide.

Please do not hesitate to contact us if you have any questions concerning this matter.

Sincerely,

Joseph W Stevens

Joseph W. Stevens
President

Mr. **Manhan**. Two, Whittaker has falsely told customers that we have stolen Whittaker's trade secrets. Three, through long association with Government purchasing officers, Whittaker has erected roadblocks for us which are hard to identify, insidious and take years to overcome, if we can overcome them at all.

For example, one of the items on the chart, the body assembly next to the bottom, we got approval on that body in October 1980 from the Air Force and then in February we got a denial letter from the Air Force saying they had been contacted by Whittaker. The body had been updated and we were no longer an approved vendor. They ended up paying $330 for a part that we had offered for $125, but, yet we can sell it to commercial airlines and use it on a DC-8 and 707.

Four, the filing of the lawsuit against us has itself been a very successful tool to stop our ability to sell. For example, the Air Force San Antonio Logistic Center, Kelly Air Force Base, has refused to consider any of our proposals to furnish parts to the Air Force until the litigation is concluded and that was just as recent as a letter of July 15, 1982. We were again told by Kelly that they could not accept a bid for 130 parts because of the litigation with Whittaker.

[Letters referred to above follow:]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS OKLAHOMA CITY AIR LOGISTICS CENTER (AFLC)
TINKER AIR FORCE BASE, OKLAHOMA 73145

REPLY TO ATTN OF: PMD

FEB 10 1981

SUBJECT: Source Qualification, NSN 2995-00-626-3838RT, Whittaker P/N 121462, Body

TO: Execuair Corporation
8749 Remmet
Canoga Park CA 91304

1. PMDM letter dated 15 October 1980 advised you that your corporation was an approved source for P/N 121462 Rev F. Since that approval date, we were advised by Whittaker that Rev H is current revision for this part number and is proprietary to Whittaker.

2. OC-ALC engineering has stated that there is substantial differences from Rev F to Rev H of subject part and Rev H is what the Air Force requires. Because of this information your corporation is no longer an approved source for subject part.

3. Thank you for your interest in our programs. If, in the future, you develop a proposal that will benefit you and the Air Force, please forward it to this office for evaluation.

EDDIE [illegible]. RHODES, Lt Colonel, USAF
Chief, Manufacturing & Contract
Administration Division
Directorate, Contracting and
Manufacturing

1 Atch
Copy PMDM Ltr, 15 Oct 80

AFLC - Lifeline of the Aerospace Team

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS SAN ANTONIO AIR LOGISTICS CENTER (AFLC)
KELLY AIR FORCE BASE, TEXAS 78241

REPLY TO ATTN OF: PM

16 JUN 1982

SUBJECT: Protest After Award by Execuair Corporation of Contract F04606-81-G-0080-SA56 (FD2050-82-73381)

TO: Execuair Corporation
8749 Remmet Ave
Canoga Park CA 91304

1. Reference your protest of the award of subject contract for Seal Ring, metal required for the Anti-Icing Valve for the J85-5, 13, 17, 17A engine to Whittaker Corporation, No. Hollywood CA.

2. Review of your protest indicates that you are protesting the award based on the legal rights to the Whittaker data.

3. Your protest alleges that the award to Whittaker Corporation was improper based upon the fact that you now currently have two contracts to manufacture similar items for the Air Force utilizing the same Whittaker data. These two contracts were issued by OC-ALC.

4. According to our records your firm has been sued by Whittaker Corporation for allegedly using Whittaker's drawings without its permission. The court has upheld your legal rights to the Whittaker drawings; however, this decision has been appealed to the 9th Circuit Court of Appeals by Whittaker. Whittaker Corporation has submitted to our legal department a copy of its appeal and a copy of its drawing with the restrictive legend and other pertinent data. Data are currently being reviewed by our legal staff. Until a ruling is made by a higher court, the PCO determined an award could not be processed to your firm. Further delay in making this award would have seriously jeopardized our engine program; therefore, it was determined an award must be made to the only approved source, Whittaker Corporation.

5. Based upon the above findings and determination, and in accordance with the directions of AFLC DAR Supplement 2-407.50(a)(2), you are hereby notified that your protest dated 82 May 05 is denied.

RICHARD M. JUSTUS
Deputy Director
Contracting and Manufacturing

AFLC - Lifeline of the Aerospace Team

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS SAN ANTONIO AIR LOGISTICS CENTER (AFLC)
KELLY AIR FORCE BASE, TEXAS 78241

DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

REPLY TO ATTN OF: PMWPB/B. Norman

15 JUL 1982

SUBJECT: Solicitation FD2050-82-03415

TO: Execuair
8749 Remmet Ave
Canoga Park, CA 91304

1. Reference your quote on above subject solicitation for 130 each Shaft, Whittaker Corp, P/N 115648.

2. Your proposal to furnish new manufactured material is abnegated pending resolution of the litigation between your firm and Whittaker Corp. Our records indicate the case is currently in the 9th Circuit Court of Appeals. When the litigation is concluded we will abide by the decision of the courts, in the meantime a determination has been made to acquire the material from the prime manufacturer, Whittaker Corp. Further delay in making an award on this requirement will seriously jeopardize the mission of the Air Force.

Herbert Bailey Jr
HERBERT BAILEY Jr
Contracting Officer
Dir., Contracting & Mfg

AFLC - Lifeline of the Aerospace Team

Mr. MANHAN. In the meantime, of course, we have won every stage of the lawsuit. Whittaker keeps stringing it out and now has taken an appeal from entry of judgment in our favor by the district court.

We are very grateful that the subcommittee is considering the FAA's pending proposal to amend its regulations regarding PMA approvals. First, let me say that the existing regulations, if they are fairly and properly administered, have nothing wrong with them. It is entirely correct procedure for the FAA to review the designs of those who want to make parts to go into aircraft or aircraft engines and decide whether the designs are sufficiently identical to provide a replacement part of equivalent airworthiness. It is entirely correct that the FAA should establish requirements for a fabrication inspection system, and supervise the carrying out of a fabrication inspection system.

What we do not approve of, and, indeed, we plead with this subcommittee to do what it can to change, is the unfair administration of these regulations.

I have designs for Whittaker parts which I know are the identical designs used by Whittaker. How do I know this? These were given to me by the Air Force in some cases or by the vendor, that is the subcontractor manufacturing the part for Whittaker. I have submitted these designs with a properly supported, filled out application to the FAA. I had 50 applications 2 years ago for PMA's pending before the FAA. I know that everyone of these applications was supported by a design and fabrication inspection system, which would produce an indentical, entirely airworthy part.

What did the FAA do? I could keep this subcommittee sitting here all day telling you the shenanigans that the FAA went through to avoid even acting on these applications. The cold, unhappy fact that I have to report to this subcommittee is that in the last 2 years I have had only one PMA application approved. The particular part that was approved is this little sleeve that had been submitted originally in 1977. It is a simple turning made out of bar stock. I don't see anything technical about it at all.

I think this subcommittee should be made aware of the latest procedure being applied to Execuair's applications by the FAA's Los Angeles office. The FAA has stopped reviewing our applications with its own personnel entirely. Instead, they send us a letter telling us to hire a former FAA employee, who is now in the private consulting business, as our designated engineering representative, to make the comparison of our design data with the Whittaker design data and report the results to the FAA. I have considerable difficulty in making contact with the individual named in the letter. I finally did reach him and had him to our office last week. He told me that he would charge $50 an hour, plus 77 cents per mile to go from his home to Whittaker's plant to review the design at Whittaker's plant and return to his home. This is a one-way distance of 80 miles.

I was also told by the FAA that this designated engineer had been cleared by Whittaker, that is Whittaker had interviewed him and told the FAA this individual could examine Whittaker's designs. However, the individual had to sign a paper swearing that he would not reveal to Execuair any information or anything he learned in the course of reviewing Whittaker's designs. Frankly, Mr. Chairman, if I have to pay to get a PMA, I will do so. I must have PMA's to exist. However, I think this arrangement stinks.

First, I know of no other PMA applicant in the entire United States that has to go through this and pay an ex-FAA employee to do the data design comparison which the FAA itself is supposed to do at Government expense. I pay my taxes. I should not have to pay a special tax to get a PMA.

Second, this system also results in considerable delay. The designated individual, notwithstanding that I am paying him quite handsomely, told me that he cannot give me more than 2 days a month. That is hardly enough time to clear the numerous PMA applications I have been trying to get unsuccessfully for such a long time.

Third, the Whittaker designs are supposed to be delivered by Whittaker to the FAA. There is no reason why I am required to pay mileage and $50 per hour while someone drives 160 miles roundtrip to go to Whittaker's plant to look at designs that are supposed to be made available at the FAA's office.

Fourth, the final indignity is that Whittaker's people are going to "help" the designated engineering representative make the comparison of my design with Whittaker's design. I have been told by my designated engineering representative that he is simply going to be a "clerk." He said that all he is going to do is verify that my design drawing is the same as Whittaker's design drawing. I ask you, members of the committee, why should I be paying these fancy rates for a clerk?

I hope this subcommittee gets the answers from the FAA. The experiences that I have had with the Los Angeles FAA are not necessarily the experiences of all PMA applicants all over the country. Mine are serious and I have heard enough complaints from other PMA applicants around the country to know that my problem is not entirely unique.

As far as NPRM 77-19C is concerned, this regulation will unquestionably put me out of the PMA business if it is adopted. You have heard from other witnesses in detail on what is wrong with the proposed rule. I heartily agree and endorse what they have had to say.

Thank you for your attention. I will be pleased to answer any questions.

Mr. IRELAND. Thank you very much, Mr. Manhan. So that all are aware and without objection, the basic correspondence that arrived at your doorstep from the Los Angeles office of the FAA suggesting you hire this consultant will be put in the record. It won't surprise you we will ask the FAA next Tuesday to comment on that little activity.

[The letter referred to above follows:]

TRANSPORTATION
FEDERAL ADMINISTRATION
WEST REGION
LOS ANGELES AIRCRAFT CERTIFICATION OFFICE
DOUGLAS DRIVE
CALIFORNIA 90806

08 JUN 1982

In Reply
Refer To: ANM-140L:REF

Execuair
Attn: Mr. L. S. Manhan, President
P. O. Box 1166
Canoga Park, California 91304

Reference: Your letter dated October 12, 1981

Gentlemen:

Execuair P/N E-155009, Rev. C

This is in response to your request for PMA approval per your referenced letter.

In accordance with our several telephone conversations we are referring you to a Designated Engineering Representative who has special FAA delegation authority to make findings of compliance to FAA requirements. We recommend that you employ this person in the interests of expediting your requests. However, if you are unable to make satisfactory arrangements, please advise us and we will find other means of serving you. The person to contact is:

Mr. Dave Whitney
26266 Laurelwood Lane
San Juan Capistrano, California 92675
(714) 831-9267

Mr. Whitney has been briefed by our staff on the details of your project and should be generally familiar with the project.

Mr. Whitney will make recommendations and present his findings to us. We will make final judgements and approvals and notify you in writing of our decisions.

If you have any questions, please feel free to contact us.

Sincerely,

Robert E. Follensbee
ROBERT E. FOLLENSBEE
Chief, Propulsion Branch

Mr. **Ireland**. In your testimony concerning some of these activities of the Whittaker Co., you say that they have sent out letters indicating that your parts are inferior. Are these PMA parts?

Mr. **Manhan**. Any part.

Mr. **Ireland**. In other words, when they allege that parts are inferior in these letters, I assume that that is part of your court case that you just recently prevailed on with Whittaker.

Mr. **Manhan**. Yes, sir.

Mr. **Ireland**. So, I would guess one could construe that to the extent that allegation refers to PMA parts they are criticizing the abilities and the efforts of the FAA since the FAA has totally approved those.

Mr. **Manhan**. Whittaker's attitude is that any part not manufactured by them is a bogus part, whether it is manufactured under PMA or otherwise. They are no different than any other large firm. When it is to their advantage, they hide behind the Government and when it is to their disadvantage, they run the other way. They have refused on numerous occasions to deliver the blueprints to the FAA. Mr. Craig Beard who was the head man in Los Angeles in 1977-78 prevailed upon Whittaker just to the edge of a lawsuit to get some of the documents made available to the FAA. This is what they have to do. But on the basic rule, the FAA is supposed to have access, you know, with a reasonable amount of time. You can't call the man up on Monday and expect him to go in Monday afternoon. But they jack you around and they horse you around and they will horse you around until it got to the point where Mr. Beard had to threaten a lawsuit against Whittaker so that I could at least get some PMA's. But unfortunately now that Mr. Beard is in Washington, D.C., I have lost all ability to get PMA's through Los Angeles. Whittaker bulldozes the people in Los Angeles and they just roll right along with it.

Mr. **Ireland**. Provided that it has the approval of your attorney, if you could produce for our record those kinds of letters they have used, we would appreciate it.

Mr. **Manhan**. Well, my attorney is Bleecher & Collins in Los Angeles and the lawsuit I am bound, a lot of the documents, even though we have obtained them under the Freedom of Information, I am not allowed to see.

Mr. **Ireland**. But to the extent they are available——

Mr. **Manhan**. They are available.

Mr. **Ireland**. I mean to fulfill our record here.

You indicate Whittaker's long association with Government purchasing officers. Is there documentation, and could you elaborate on that?

Mr. **Manhan**. I have some of the letters with me. One that I referred to dated July 15 from the Department of the Air Force Headquarters in San Antonio, regarding the solicitation says:

> Your proposal to furnish new manufactured material is abnegated pending resolution of the litigation between your firm and Whittaker. Our records indicate the case is currently in the Ninth Circuit Court of Appeals. When the litigation is concluded, we will abide by the decision of the courts. In the meantime a determination has been made to acquire the material from the prime manufacturer, Whittaker Corporation.

There are other backup documents from Whittaker to——

Mr. IRELAND. To the extent those are available, can we have them?

Mr. MANHAN. You can have copies of anything you like, Mr. Chairman.

Mr. IRELAND. Are you aware of any requirement an FAA-designated engineering representative must be cleared by an OEM?

Mr. MANHAN. I know a little about the designated rep, but that primarily ties in with aircraft manufacturers like Boeing and Douglas. They have people on the payroll who do a certain engineering function. They are FAA designees who are watching the aircraft as a total airplane being constructed. I have never heard of a designee in this capacity, because all the FAA requires is for Whittaker to deliver the blueprints to the FAA, an engineer at the FAA will sit and make a comparison of the drawings. The FAA on every PMA that I have, Mr. Ireland, has a copy of my drawing on file. My drawings are on file at the FAA. Whittaker's are not.

Mr. IRELAND. Then that raises the question of the accessibility that you were referring to before.

Mr. MANHAN. Yes.

Mr. IRELAND. The office in Los Angeles, when Mr. Beard was there, had to threaten a lawsuit in order to get access to——

Mr. MANHAN. Right, but he got access. I don't know whether he made them deliver the documents or Whittaker gave the FAA direct access to their office.

Mr. IRELAND. You would think that the general public would be a little concerned about that, wouldn't you? I mean, if that is the FAA and that is their charge to look out for our safety and they are denied access to a corporation's designs?

Mr. MANHAN. Well, this is clear that the big guy has a bigger stick. You know, I have gone to the FAA many times when Mr. Beard was there and the place was literally overrun with attorneys from Whittaker.

Mr. IRELAND. Have you heard of other OEM's that deny FAA the access to their designs and have to be threatened?

Mr. MANHAN. Yes, sir. There have been a number of cases. The classic line is everybody is always sued for stealing trade secrets. Trade secrets can never be delineated in court. In our case, for example, it took Whittaker 3 years to list out 300 and some odd trade secrets that we stole, and all they were were a list of part numbers. On the part number list was that ball bearing.

Mr. IRELAND. Well, I think we all pretty well understand the trade secret business is kind of a red herring. I am sure we all know that it gets tossed out here on a regular basis. But if it were so serious, I am sure we would have had lots more litigation than we have had in the past.

Mr. MANHAN. Right.

Mr. IRELAND. Mr. Lynch?

Mr. LYNCH. If the gentleman could later cite to the staff the letters in question he is talking about sent to the FAA by OEM's complaining about your products, we can ask the FAA to provide the subcommittee with copies of those letters.

Mr. IRELAND. Fine.

[The material referred to above is on file with the subcommittee.]

Mr. LYNCH. I do have one question and it is something that I have not understood and a lot of people have referred to and will continue to: drawing revision designations, where you think you have an approval and there is a letter added or whatever. Could you briefly explain exactly how that is done, and what the implications are?

Mr. MANHAN. Well, we went through this with the FAA and they did take the time and they proved our point in Los Angeles. Drawings come out. Usually the first one is experimental and then the second one is letter A and the next one is letter B as changes are made. In many, many cases, as companies are bought and sold, they move. They change the title block, which changes the address or they may make a change in the tolerance of the part to make it easier or more economical to manufacture. They will add a change letter to the blueprint. It doesn't mean anything. It is just an inhouse way of keeping track of the changes that have been made.

Good engineering practice dictates if a change is that significant to a part, you will change the part number. So, letter changes are very insignificant and in most cases, we have found, meaningless.

Mr. LYNCH. A final question. Have you ever used one of these designated engineering representatives before or is this the first time you have come up against this?

Mr. MANHAN. This is the first time we have come up against this and we asked the FAA, because we do have a firm around the corner from us that does a lot of structural airframes, and we asked could we use their designated engineer because he is much closer and at 77 cents a mile, I was looking to curtail cost and we were told we couldn't use that particular designated engineer because he wasn't qualified. So, catch-22.

Mr. LYNCH. But he is supposedly a designated engineering representative?

Mr. MANHAN. Yes, sir. He is.

Mr. IRELAND. A designated clerk.

One last question if you would, Mr. Manhan. In the previous testimony by Mr. Dedmon, he pointed out what I guess I would say was a rather interesting and provocative statistic that this proposed regulation would instantaneously make unsalable parts inventories across the country that are held not only by manufacturers, PMA manufacturers, but also overhaulers, fixed-base operators and such. Those parts in the bin would be immediately unusable and, therefore, worthless. Obviously, these people have a sizable investment in those parts. The gentleman indicated that he alone deals with some 2,500 of these people, probably 99 percent of them small business. Is that the nature of your business? Are you dealing with a large number of small overhaulers, fixed-base operators?

Mr. MANHAN. Yes.

Mr. IRELAND. You agree with Mr. Dedmon's statement?

Mr. MANHAN. Yes, but there is one other step. We also deal with some of the Nation's and the world's airlines. So, it would take what? $100 million, $200 million worth of airline inventory that all the airlines are holding because today you can buy a part from any of the prime manufacturers. You are lucky if the part number is stamped on there, let alone the revision letter. So, it would mean the entire inventory of some of these airlines would be completely worthless and useless and unairworthy.

Mr. IRELAND. I understand that and that is a nice piece of change, a couple hundred million dollars worth of inventory, but let me have your reflection on these fixed base operators and overhaulers that, as Mr. Dedmon mentioned, are small businesses for the large part. Is that your feeling about these people?

Mr. MANHAN. Oh, yes. Absolutely. It would wipe out everybody's—the FAA/PMA inventory that I have in stock now would be unsalable.

Mr. IRELAND. I am searching for this undemonstrated need and for some justification for the FAA's zeal in this area and for their quickness to certify under the Regulatory Flexibility Act that this doesn't affect small business. In the inventory regard alone, it would be a pretty telling blow for quite a few people across the country.

Mr. MANHAN. It certainly would.

Mr. IRELAND. Thank you very much, Mr. Manhan.

Mr. MANHAN. Thank you.

Mr. IRELAND. Our next two witnesses are Mr. Robert Beckman, of Beckman & Farmer in Washington, D.C., who is accompanied by Mr. Al Backstrom of Frisco, Tex. Gentlemen, I realize you don't have a prepared statement, but if you would proceed we will have some questions for you.

Mr. LYNCH. Mr. Backstrom, would you state basically your background, education, qualifications to discuss the aviation industry replacement parts, FAA procedures, et cetera?

TESTIMONY OF ROBERT BECKMAN, ATTORNEY, BECKMAN & FARMER, WASHINGTON, D.C., AND AL BACKSTROM, AERONAUTICAL ENGINEER, FRISCO, TEX.

Mr. BACKSTROM. Yes, sir. I am a graduate aeronautical engineer from Mississippi State in 1953. I am a registered professional engineer in the State of Texas. I am a Federal Aviation Administration designated engineering representative in the area of structures, airplane installation of engines. I have a commercial pilot's certificate, airplane mechanic's certificate and for approximately 25 years I worked for the Federal Aviation Administration. During this period of time I worked on replacement parts as a small part of my job. For 15 years it was a significant portion of my job.

Mr. LYNCH. What offices did you work in in the FAA?

Mr. BACKSTROM. Fort Worth, southwest region only.

Mr. LYNCH. We have heard the word "safety" mentioned quite often. It seems that safety is brought up by everyone, but nowhere in the rulemaking record does there seem to be any evidence supporting why this regulation is needed in the interest of safety. In your experience at the FAA what was the general safety record of parts approved in the PMA system?

Mr. BACKSTROM. The safety record was excellent. I know of no problem with PMA approved parts that had not come in the same parts from the original equipment manufacturers.

Mr. LYNCH. Going along with that, do you believe that this would increase the administrative burden on PMA's, whether they be people who hold PMA's or people who might want to apply as opposed to the rules that exist now?

Mr. BACKSTROM. For the applicants for the PMA's, yes, it would be an additional burden, a significant burden.

Mr. LYNCH. In this current rulemaking, there is a proposal to require testing of critical precision parts. Can you explain what exactly they mean by critical precision parts?

Mr. BACKSTROM. I am not going to try that. To my knowledge, there is no FAA definition of what a critical part would be and if I were back working for the FAA, I would assume that I would have to make the decision as to what was critical as would the people who were there now.

Mr. LYNCH. Did you attempt to find out? Did you ask anyone at the FAA?

Mr. BACKSTROM. Yes, I asked one of the people at the southwest region. They indicated that they would essentially, like I say, have to make up their own minds, use the dictionary definition and so forth.

Mr. LYNCH. There is nothing in the FAA regulations that concerns that?

Mr. BACKSTROM. There is nothing that I know of.

Mr. LYNCH. We have heard a lot about the burden at the present time on the FAA itself of receiving applications, approving applications to see if a design is identical, et cetera. In your experience what type of burden on the agency man-hours, et cetera, are we talking about when an application comes in?

Mr. BACKSTROM. The typical PMA part is a small part, as has been shown around here today, and the processing time on that typically should be less than an hour.

Mr. LYNCH. Less than an hour.

Mr. BACKSTROM. Per part.

Mr. LYNCH. In your experience, were there enormous amounts of such requests for PMA's when you were——

Mr. BACKSTROM. I can only speak for the southwest region.

Mr. LYNCH. We realize that.

Mr. BACKSTROM. In that region, typically we would run between 150 and 200 a year, I would say.

Mr. LYNCH. 150 to 200 a year. The average would be an hour and that would be mostly the smaller parts. What would be the longest time someone would take on a PMA design for a major part?

Mr. BACKSTROM. On the order of 2 to 3 hours, I would say.

Mr. LYNCH. Was there a problem when you were at the FAA in getting people to do this type of work? Is that a problem at all at the agency?

Mr. BACKSTROM. Well, it is boring. Boring jobs people don't like to do. I am sure I was as guilty of that as some of the others. It is a boring job.

Mr. LYNCH. Based upon your experience, taking the world as it is today, do you see any need for change in the PMA regulations?

Mr. BACKSTROM. I don't think there is a need to change. I am sure like all rules they could be improved, but I don't see a need.

Mr. LYNCH. We have heard there seems to be a policy question. Some people feel there isn't a change needed in the regulations, but there is a change needed in the administration of that regulation. If you are in the southwest region, for example, it might be entirely different from the gentleman who just spoke from Los Angeles. Is that a problem or have you ever encountered that problem that people would tell you, Well, you people are fairly reasonable on this, but in other parts of the country we just can't seem to understand why they don't approve our designs?

Mr. BACKSTROM. Yes, sir. I have heard that quite a lot. The basic problem and I don't know a solution, I just accept it as a problem, is that every person has an entirely different background. They look at things entirely different. Some people with a large background in airframe parts will accept deviations and so forth that other people wouldn't. You have to get the clone system going to get it uniform.

Mr. LYNCH. Have you ever encountered or heard of anyone encountering the problem that was just mentioned where the OEM would either not provide information to the FAA, or delay the process as long as they could?

Mr. BACKSTROM. No, sir, I haven't. I have no knowledge of any problems like that, particularly through the southwest region.

Mr. LYNCH. That is all the questions I have, Mr. Chairman.

Mr. IRELAND. I have no further questions for Mr. Backstrom. Mr. Beckman, do you want to make a comment?

Mr. BECKMAN. Yes, sir. I will not repeat what has been said by the others, but just make a few observations I hope will be helpful to the committee. I am focusing particularly on the Regulatory Flexibility Act. The FAA has certified this proposal we are here discussing, NPRM 77-19C. The FAA said, and I quote, "This proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities." I suggest, Mr Chairman, that this certification reflects an indifference for the requirements of the Regulatory Flexibility Act.

The FAA itself said that this proposed regulation is significant under President Carter's Executive Order 12044, and the implementing Department of Transportation policies and procedures. The FAA itself said in its regulatory evaluation accompanying NPRM 77-19C that it was a significant regulatory action and it explained why and I quote, "Because of competition and the safety issues and substantial interest."

The FAA knows from its own records that there are a substantial number of small businesses who have sought and obtained PMA's. The FAA knows that there are many overhaulers, which are small businesses and rely on PMA parts to be able to compete. Certification of NPRM 77-19C, I respectfully submit, is not sustainable.

Executive Order 12291, issued by President Reagan, indeed, his first Executive order, was in many ways a larger effort similar to that zeroed in on small business by the Regulatory Flexibility Act and the FAA has, I respectfully submit, erroneously concluded that this proposal, NPRM 77-19C is not a major rule under President Reagan's Executive order. The Executive order is designed to reduce the burdens of regulations, to increase agency accountability for regulatory actions, to provide for Presidential oversight of the regulatory process and insure well-reasoned regulations.

It applies to all regulations that have significant effects on competition. The FAA itself observed, as I have pointed out, that its action here was significant because of competition. An internal FAA memorandum of August 19, 1981, which this committee has, conceded the applicability of President Reagan's Executive order.

I submit that the economic evaluation which was performed pursuant to a request in August 1981 was not put into the record. We are very grateful to this committee, and I am sure the committee will be very interested in perusing the evaluation. But when the chairman held it up, it was awful small. We did obtain under the Freedom of Information Act part of the survey that was taken, and the bits we have—and that is only part of it—are that thick and I gather what you have is much smaller yet. I am not sure, Mr. Chairman, whether you really have the whole——

Mr. IRELAND. I can assure the gentleman we will make sure that we have every pound of it.

Mr. BECKMAN. The FAA's mission, quite clearly stated in its organic statute, the Federal Aviation Act, it is safety. No safety reason appears in the proposal 77-19C. Replacement parts made under PMA's have an excellent safety record. Erecting regulatory barriers to obtaining PMA's and to selling PMA-produced parts is not and, indeed, cannot be justified on any grounds of safety. To the contrary, Mr. Chairman, I suggest that choking off PMA's will lead to the resurgence of bogus parts, that is, parts not made under FAA supervision and bogus parts do present a safety problem.

Thus, it is our submission that the proposals in NPRM 77-19C if adopted will decrease safety in aviation. The administration of the PMA system imposes little administrative burden. The comparison of a PMA applicant's design with a type certificate holder's design takes about an hour on average. A particular FAA office will get maybe 2 or 3 applications a week, some more, some less. There is no administrative burden justifying choking off the PMA system. There is a long history for this FAA action. At the instance, for example, of Avco-Lycoming, one of the witnesses here today, the FAA brought Superior Air Parts to its knees in 1974. For 2 years, Mr. Chairman, Superior Air Parts could not get a PMA approved and for months could not sell parts it had already manufactured.

At the instance of Whittaker, the FAA erected obstacle after obstacle to throw in the path of Execuair. These two companies who came here to testify at their own expense from Texas and California respectively are only two of the many, many small businesses who have felt the heel of the FAA on their neck. The records of the FAA docket on this PMA rule literally bulge with a similar objection of many other small businesses to protest the FAA's proposal.

We have prepared a chart, which is here on the side of the hearing room. It is an illustrative chart and we have not included the names of the companies, but the data has been fully documented to the committee's staff. I cannot see, Mr. Chairman, how anyone can look at this chart and remain calm. Remember, we are talking about identical charts made to the same design often by the same vendor. These price differences for the same part are an outrage.

We are talking about tens of thousands of parts being bought for our military aircraft with taxpayers' money. How can this happen? Congress with the leadership of this subcommittee has passed laws requiring the Defense Department to obtain competitive bids, requiring the Defense Department to deal with small business. The Defense Department itself has promulgated regulations with the force and effect of law requiring competition, requiring small business participation.

I respectfully submit, Mr. Chairman, that this is a most serious matter. The General Accounting Office of the United States should be asked to investigate. There is a ripoff of millions of dollars in taxpayers' money. It is blatant. It is unjustified and I submit it is unjustifiable.

Thank you, sir.

[The illustrative replacement part price list follows:]

ILLUSTRATIVE REPLACEMENT PART PRICES

Part	Type certificate holder		PMA holder
	Government contract	Commercial	
Stator motor	$63.00	$28.23	$17.50
Plate actuator	56.00	36.84	21.00
Gear assembly	70.00	26.16	13.25
Armature	155.00	64.16	35.00
Plate	63.80	36.84	11.00
Field assembly	36.75	23.16	10.00
Slide	42.00	22.35	8.75
Housing	118.00	26.16	19.00
Shaft	93.00	11.40	7.50
Field assembly	49.50	24.78	12.50
Bearing	75.00	10.69	6.50
Baseplate	98.00	39.24	17.00
Spring	2.75	0.36	0.18
Shaft	43.50	24.83	14.50
Baseplate	115.00	39.24	17.00
Body	330.00	207.00	125.00
Plate	54.00	32.08	15.00

Mr. IRELAND. Thank you, Mr. Beckman.

We are concerned about the many, many fixed-base operators, overhaulers, the small businesses that have, perhaps, only $5,000 or $10,000 worth of parts in their place, but to the size of their business it is a big item, being wiped out and having these unusable parts.

One of the witnesses mentioned that it was perhaps $100 million alone in the airline industry. Could you give us a feel of what kind of inventory that might be in our own military, because I assume that those same parts that would no longer under this regulation be usable for the small, fixed-base operator or for the airlines would certainly be unusable for the military. It would be inconsistent if it were not. Do you have any estimate of what might be involved there in dollars?

Mr. BECKMAN. I do not and, of course, much of what the military inventory is is kept confidential.

Mr. IRELAND. But, certainly, vast numbers at additionally high prices?

Mr. BECKMAN. Just one of the parts that the Execuair's witness passed up represents some 50,000 parts that fits 50 pieces that are needed of that baseplate. It wears out and has to be replaced. You are talking about an enormous amount of money.

Mr. **Ireland**. In your view you were talking about the burden on the FAA having to handle this PMA design operation and you mentioned a few hours and Mr. Backstrom also commented on the nature of the work. In view of your comment and his comment, can you give us any idea why they would need a consultant? Have you ever heard them say why they need a consultant like this individual they referred Mr. Manhan to who commutes at 77 cents a mile.

Mr. **Beckman**. I think as an illustration, Mr. Chairman, the FAA is going to have to tell you and they will have an opportunity. You asked what I think. I think it is an illustration of a company being big enough to bully the FAA, tell the FAA we just won't give you the design. You're going to have to find some other way to solve the problem and this is the FAA's solution, out of Execuair's hide.

Mr. **Ireland**. Interesting. Do you have further questions?

Mr. **Lynch**. That brought one thing to mind, Mr. Beckman. When an individual like this is appointed by the FAA, this individual goes to Mr. Manhan or whomever. I assume he then takes Mr. Manhan's design with him, leaves, goes to the OEM, whoever it is in this case, and compares it. It seems to me, if we are going to talk about trade secrets or whatever and that issue comes up, that we have a reverse case here where the PMA is being affected. How can an individual come in and take someone else's designs and go show them to someone else so all those people know and then bring it back and say, well, it is either good or it is no good and here you are, thank you very much? Wouldn't there be some question of, perhaps, a trade secret there if someone wants to raise the issue?

Mr. **Beckman**. It is certainly a very nice point.

Mr. **Lynch**. Thank you.

Mr. **Ireland**. One further comment. Would you lead us one time again through your reasoning that this new regulation would lead us into bogus parts or the threat of bogus parts?

Mr. **Beckman**. The new regulation, if adopted—we fervently hope it is not—will mean that PMA applicants who attempt to gain approval by submitting designs for comparison must also submit the drawing revision designation letter on the OEM's drawing, which the PMA applicant cannot know. Therefore, in practical terms, there will be no more applications. Similarly, all of the parts which are now on the shelves will have to be re-marked. They will have to be re-marked with the drawing revision designation of the OEM. Again, the independent parts manufacturer not having access to the drawing of the OEM cannot so mark his parts, so that the parts cannot be installed in an airplane. The law states that parts can only be installed when they comply fully with the regulations.

The result of this is that there will no longer be the FAA supervised, low-cost, very low-cost, available parts and I think it is very interesting that the airlines of the United States through the Air Transport Association submitted a long objection to the FAA and said, we, the Nation's airlines will be denied access to lower cost, fully FAA approved replacement parts.

Our fear is this, Mr. Chairman: If the entirely legitimate FAA-approved source of replacement parts is cut off by adoption of this rule, there will be a pressure for replacement parts outside of those produced by the OEM for several reasons. One, the OEM's don't, in fact, manufacture enough product support in all cases, and two, there are always people who want to buy a cheaper product. This is unfortunately a fact of life. People like to save money today and thank goodness for the FAA. We want to compliment them. For 25 years they are the ones who dreamt up the PMA system. The regulations are excellent. They have provided an FAA-supervised method of low cost replacement parts.

If that system is inhibited and curtailed as we think it will be by the proposal, then we will see, we believe, a resurgence of the bogus parts. People will just go out and get any kind of metal and stamp it any way they want and call it made by an OEM. I hope I have made it clear.

Mr. **Ireland**. Fine. You have, indeed.

Gentlemen, thank you very much. We appreciate your help.

We have now representatives from the Airline Services Association, three gentlemen. Who have we got here?

Mr. **Wilbur**. Yes, sir. I am Robert Wilbur. Ms. Lola Blatt is unable to attend. I have with me here two gentlemen from NORDAM. Ray Siegfried is president of Nordham and Charles Ryan is general manager.

Mr. **Ireland**. Gentlemen, we appreciate your attendance and look forward to hearing what you have to say.

TESTIMONY OF ROBERT H. WILBUR, EXECUTIVE DIRECTOR, AIRLINE SERVICES ASSOCIATION, INC., WASHINGTON, D.C., ACCOMPANIED BY RAY SIEGFRIED, PRESIDENT, AND CHARLES RYAN, GENERAL MANAGER, NORDAM-LORI, TULSA, OKLA.

Mr. **Wilbur**. Thank you, Mr. Chairman. We have given our prepared statement, which I am sure you will include for the record. As many of our points repeat those which have already been made by many of the previous witnesses here this morning, I will summarize our prepared statement and then turn to Mr. Ryan who is also a member of our board of directors for elaboration on how the proposed rule would affect NORDAM.

The Airline Services Association is a relatively new organization. It was founded in early 1980 by a group of 13 companies who saw the need for unified organization and stronger representation of the firms which provide parts and services to the commercial airline industry. From those original 13 members, the organization has now grown to 67 to include aircraft parts distributors and redistributors, aircraft and engine overhaul, and replacement parts manufacturers.

The goals established include the following: First, to encourage superior quality in product supply and technical service. Second, to help establish and maintain uniform and stable relations between the members of the association and the airline industry worldwide. Third, to gather and disseminate information which will assist our members in performance of services to their customers. And, fourth, to encourage and aid in the establishment of uniform standards designed to insure the traceability of equipment and the quality of services performed by members.

One of our board of directors' first activities was the development of a code of ethics to which all of our members must subscribe. Two of these paragraphs are directly relevant to the subject before us. These are, "All members will maintain the necessary inventory and accounting records to insure traceability of material."

Second, "No member will deal with bogus or stolen material. Knowledge of any activity concerning bogus or stolen material will be reported immediately to the appropriate Airline Services Association committee."

Mr. Chairman, this is intended to place a very strong obligation upon our members to scrutinize their material and their sources and to maintain necessary records. The members who developed this code considered whether the qualifier "knowingly" should be included in paragraph 3 and decided that it should not. In the airline services industry to do business unknowing of a violation is no excuse. A member's responsibility is to know for sure that he is not dealing with any bogus materials. It is a commitment not just to professionalism and to the ethics of fair competition but also a recognition of the element of safety in this business in which our members are engaged.

Let us turn in this light now to FAA Notice 77-19C, called Parts Manufacturers Approval—Falsification of Airworthiness Certification Documents. I might note that phrase, "Falsification of Airworthiness Certification Documents," has not really been discussed here this morning, and may indicate a very misleading title for this proposed revision of an important regulation.

Almost all of our members—whether parts manufacturers, overhaul firms, or parts and equipment redistributors—are small businesses. Of the parts manufacturers, such as NORDAM, all would qualify as small businesses under SBA definitions. Of the overhaul and parts redistributors, most also fit this definition. Even the few which fall outside it would be considered small businesses in almost any other perspective.

First, very briefly, from the viewpoint of replacement parts manufacture, as the gentlemen from Superior and Execuair have described this in some detail. We see no justification for FAA's proposed requirement that PMA applicants identify the type certificate holders drawing revision designation, and mark PMA-produced parts with this drawing revision designation. The FAA currently requires that a PMA applicant demonstrate that his design produces a part identical to that manufactured by the type certificate holder and that his inspection systems are adequate to insure quality. We support these procedures as essential to safety in parts manufacture. However, the additional proposals that an applicant identify the type certificate holders' drawing revision and label its parts with this revision seem to us totally unnecessary to safety.

The FAA proposal indicates that the purpose of the proposed change is "to relieve the need for the FAA to compare the applicants' data with every approved revision level of the part with which the applicant claims design identicality." While we sympathize with FAA's desire to simplify its task, we believe in this case the FAA has failed to consider the impact on small business as well as on the airline community in general.

In most cases, as spelled out already, only the original equipment manufacturer has access to these drawing revision designations. To require the replacement parts manufacturers both to cite these drawing revision designations and to label their parts with these designations would effectively preclude these firms from competing with the original equipment manufacturer in the production of replacement parts.

As noted above, the FAA, on receipt of a PMA application, is able to compare this application with the drawing revisions on file. If any revision affect safety and reliability, and if the parts manufacturer has not produced a part effectively identical, the FAA will reject the PMA application. By attempting to shift the responsibility for obtaining and comparing design revisions from its own personnel to the PMA applicant, the FAA would create a monopoly for the production of replacement parts. While no advantages to safety would follow, the economic effect would be to seriously limit competition. Reducing sources of supply would increase both the cost of parts and the lead-time required to get them. Some replacement parts needed by the airlines—both for economical performance and even for safety—might even become unavailable.

We note particularly, as Mr. Beckman has mentioned, that our customers in the commercial airlines in comments prepared by the Air Transport Association have stated, and I will quote directly:

> The airline industry is in vital need of a continuing flow of safe and FAA-approved replacement and modification parts. The source of these parts should not be limited either by implication or by regulation to any one source. While we cannot believe this is the intent of FAA, there is some concern that the proposed rule, if adopted, could result in the reduction of available sources for safe, economical, FAA-approved parts, particularly replacement parts.

That is the end of the quotation from ATA.

Second, the impact of this proposed regulation upon firms which provide overhaul services. Overhaul firms must have a steady and reliable flow of replacement parts for critical aircraft components. A number of small manufacturers of aircraft parts among our membership have entered the replacement parts manufacturing business principally to assure the continued flow of parts which either are no longer being made by the original equipment manufacturer or which were being made only with extremely long lead-times or at prices which our members found excessive.

These aircraft parts overhaul firms could not continue in business if they were dependent upon sole sources for the parts which they must have safely to overhaul commercial aircraft components.

Third, there would be a serious impact on the parts redistributors among our membership. This is the effect on the existing inventory. In recent years the aircraft parts redistribution industry has grown tremendously because of the wide dispersal of serviceable older aircraft throughout the world. Often the replacement parts needed to keep aircraft flying efficiently and safely were excess inventory in the hands of airlines which had sold or no longer used certain types of aircraft. In many cases the original equipment manufacturer was no longer producing the parts or produced them only in limited quantity and long leadtime. An efficient redistribution system, therefore, became essential to the safe, and economical operation of our commercial air fleets.

We strongly support the necessity for traceability. However, the labeling requirements for PMA's currently in effect provide the necessary marking. However, if the FAA decided that henceforth all PMA parts sold for installation on airplanes must carry the latest drawing revisions, an immense inventory of safe, existing parts would become unusable and unsalable. Even if the FAA made this change prospectively, our customers in the commercial airline industry, with concerns over liability unnecessarily created by this revised FAA requirement, would cease to utilize the existing inventory of parts which lacked drawing revision designation. While this might be a windfall to some parts manufacturers, it would be a disservice to firms which now inventory airline parts, and also to our customers, and to the flying public.

It seems obvious that the impact of this regulation upon small businesses would be immense. The FAA was incorrect in certifying this rule would not have a significant impact upon a substantial number of small entities. In issuing this proposed regulation, it has failed to follow the Regulatory Flexibility Act. If the issue were one of safety, we would not argue that the Regulatory Flexibility Act applies. Where there are questions of safety, a small firm obviously must meet all essential standards, just as a larger one. But this is an issue not of safety, but of competition, economics and equity. Diversity of manufacture, the availability of parts, and the use of existing inventories must be maintained.

I now ask Charles Ryan from NORDAM to provide some examples from his company's experience. We stand ready to assist this committee in any way.

Mr. RYAN. Mr. Chairman, I would like to begin by providing a brief introduction into NORDAM and our business. We are an aerospace manufacturing firm also involved in the repair and the distribution of aircraft parts. We are located in Tulsa, Okla. We employ 350 people and we have sales of approximately $25 million per year. Once again, our primary customer base is the commercial airline industry worldwide, for which we manufacture, repair and distribute parts. As a company we currently hold 23 parts manufacture approvals or PMA's. The predominance of the PMA's that we hold relate to aircraft transparencies or most specifically aircraft cabin windows and side cockpit cabin windows. These are for the most part on the commercial jet transports.

We have distributed these windows under PMA's since the summer of 1977. Prior to our entering into this segment of the market in 1977, the only sources available for transparencies and windows were the original equipment manufacturers. Since we have introduced our windows into the marketplace, we have had a rapidly escalating market share growth and very wide acceptance from the operating community, including many cost-effective savings programs that have been generated through value analysis committees.

Our current position has grown to an annual sales figure in the window area of approximately $4.2 million and we are currently carrying an average onhand inventory of $1.2 million in aircraft transparencies. With that sales volume equaling approximately 17 percent of our gross revenue and our current inventory and the potential obsolescence of this inventory by 77-19C, our concern as a manufacturer becomes rather obvious.

However, even though we are only one representative from the community and that being designated as the small business community, undoubtedly it would have an impact on us. But we believe it would be far more ominous for the entire industry, particularly when we look at the history of the window pricing. Since we seem to have discussed pricing considerably today, I would like to point out specific examples from one large airframe manufacturer, in their pricing history from 1 year, including their effective catalog prices for the year prior to our entry into the window replacement market, what happened to their prices across the board the year after we entered, and then a recent example.

The analysis indicates that what the introduction of competition and conversely, in this case, the absence of competition do to pricing in this supply industry. From the 1978 published price catalog to the 1979 catalog, the prices of aircraft transparencies in the previously referenced circumstance were reduced by approximately 40 percent. It is interesting to note that this substantial price reduction, which of course benefited the entire industry, just happened to come in pegged just below the prices that we were currently charging the industry at that time.

This pricing strategy that was put forward in that timeframe has seemed to have been reintroduced as early as the spring of this year. In one window assembly, the side cockpit panel, the 1981 catalog price is $10,460 to the industry. In a supplemental letter to the price catalog, the manufacturer came in and reduced that price in a single reduction to $6,276.

That type of savings is an example. We have one airline customer, just one, that purchased 72 of those assemblies from us in the past 12 months. That would account for a $300,000 differential to that one air carrier in that 12-month period.

Now, when I look at this, although it is certainly presumptive on my part, we feel that the enactment of the proposed rules would create a scenario of radical price increase, damaging not only those companies that had their product lines dissolved through the rule, but the industry as a whole.

In the current economy that exists, particularly the economic state of the airline industry—we have already referenced one airline that used to exist today—the timing could not be worse for this type of rule and one with the potential impact of this ruling. Earlier in the discussion we talked about the obvious impact that this rule would have on the sales and profitability of our company. To possibly indicate some of the potential impact on other small businesses, we would like to refer to the 1981 publication of parts manufacturer approvals published by the FAA.

This volume, which we currently received, carries approximately 20,000 parts manufacturer approvals in it. That is a large volume, indeed, and in just perusing through there and looking at the holders of these PMA's, it became apparent that the very large majority of the holders of these some odd 20,000 PMA's are, in fact, small business entities. For the FAA to have certified that this proposed rule would not have a substantial impact on small entities, they would have had to ignore the depth and the breadth of the parts manufacture approvals that they themselves have issued.

In many instances these small suppliers and manufacturers are totally dependent, as we have heard reference today, on a single product line entity or one manufacturer's parts. If, in fact, these product lines are PMA derivatives, they would have little alternative for future business.

Business failures in the small business community, rapidly escalating prices, combined with what has already been demonstrated to be scarcity of materials would be the result of the proposed rule that in its current state is not truly designed to enhance safety but, in fact, is said to be designed to reduce the administrative burden at the FAA. It appears that they will reduce it at the expense of a lot of small suppliers to the industry.

Based on these examples and opinions that have been previously registered by the ATA and the Council for the Advocacy of the Small Business Administration and the Justice Department, it would seem to be imperative that the FAA formulate and provide a complete impact statement, substantiating that certification that there would be no substantial impact on small entities. These are the examples we wanted to present to the committee today. We appreciate the opportunity of doing so and are prepared to answer any questions that you might have.

[The material referred to above is on file with the subcommittee.]

Mr. IRELAND. Thank you very much, Mr. Ryan and Mr. Wilbur.

We are talking abou the burden on the FAA of this program and, of course, that is heightened by the awareness that they somehow are so strapped that they have to get former FAA representatives apparently to help them as consultants. In your view of the PMA process, is this a great burden on the FAA.

Mr. RYAN. Well, I have heard testimony from people who have direct experience with the process that it is not a great burden. If you talk to some of the folks in the southwest region, they would swear it is the greatest job on Earth in terms of complexity and time. That is when you have your applications there and have waited from 6½ to 7 months for an answer. But, no, I think that if in fact we are dealing in an order of magnitude of 1 to 3 hours for review and approval, I can't say that that is an enormous administrative burden and I have to trust the judgment of people who have actually performed that task for the FAA. I agree right now with the procedure and have heard some other folks reference that they believe that as it is currently written with some exceptions possibly to variances in administration of that rule from one region to another, which some people have taken exception to, it is a good rule and it facilitates exactly what it was intended to do when it was brought forward, to curtail the bogus parts that were becoming a problem at that point in time, but also keep the industry in the business of a good source of supply of possibly lower cost, but equally as safe items. It is doing that right now.

Mr. IRELAND. Well, as you probably heard me say earlier, one of the great mysteries here comes forth from what you said. That is what is the great need? Somewhere along the line the FAA has referred to increased competition coming from this. Do you see that line of reasoning? Where would you see increased competition coming from this regulation as promulgated?

Mr. RYAN. Well, if you will pardon my answer, the competition would probably be from the machine tool people that are tooling up for the OEM's to take over the rest of the market. That would be the enhanced competition. I can't for a moment understand how the FAA can believe for a moment that there is going to be enhanced competition for that aftermarket among any other people other than the original equipment manufacturers.

I imagine there are some folks that might have these revision numbers. I don't know how requiring revision numbers is going to improve competition. We would not have them. We couldn't possibly get them and our business of PMA to the tune of $4.2 million would be over.

Mr. IRELAND. The revision number, I take it from what you say, may be more valuable than a good lottery number. Is that right?

Mr. RYAN. It could probably command a pretty high price in the future if that rule were enacted. I think that one point that I didn't hear today, but I have seen it in some of the claims made by the ATA and the Justice Department report, is that the regulation seems to be unequally administered at this point in time as proposed. If those revision numbers are so important to air safety, and there may be some valid reason—they haven't demonstrated any—it would seem that the original equipment manufacturer would have that revision number on their parts as well. If you are trying to protect the end user, the guy out there that is hanging it on the airplane, then he is going to have the same information void when he is starting to handle parts from the OEM because they don't have the requirements. He won't know what revision level he has. That revision level is not significant either.

Mr. IRELAND. I am interested, of course, as I have said as to the effect on not only you PMAers, but small businesses, the numbers of which keep increasing in this testimony that are out there with inventory that would become instantaneously obsolete. Do you deal with these fixed-base operators and overhaulers or is primarily with airlines?

Mr. RYAN. We deal in both those market segments, predominantly with the airlines, but we do quite a bit of activity with the FBO's and other overhaul facilities that overhaul equipment that utilize our products. Some of our products, including both parts manufacture approval items and items that have SPC's or supplemental-type certificates.

Mr. IRELAND. This inventory that would become obsolete, any way that you think that we could verify the figures?

Mr. RYAN. As far as putting a value on it, there is such a wide variety within those PMA's. We have noticed some items here which are carrying sale prices of $8.36 there. It would be hard for me to estimate. We are carrying items that are $8,000 per unit, inventory cost to shelf cost factor. With 20,000 some odd parts manufacture approvals, I would be hesitant, sir, to put out an estimate on the total value. I do know that ours is $1.2 million and we are out of business to the tune of $1.2 million the day it is enacted.

Mr. IRELAND. Mr. Skelton, do you have a question?

Mr. SKELTON. I am sorry I had to leave for a few minutes. I have a question. My question may not go to you, but who is the gentleman that testified regarding the illustrative replacement part prices?

Mr. MANHAN. Mr. Manhan.

Mr. SKELTON. Yes, sir. I have in front of me an exhibit called a bearing cost of $3.10, commercial list price of $10.69 and a Government contract price of $75. I also have in front of me the list that is comparable between everything from bearings to shafts, et cetera. What portion of these Government contracts are military?

Mr. MANHAN. They are all military.

Mr. SKELTON. All these are military?

Mr. MANHAN. Yes, sir.

Mr. SKELTON. Can you tell me why the disproportionate price as compared to the commercial price?

Mr. MANHAN. When you are the only game in town, that is the price. When you have precluded all your competition by sending letters to the Air Force saying that Whittaker will inspect all of my inferior parts at no charge for the Government, that precludes me from bidding. It is unfortunate you were out of the room when I was speaking, Mr. Skelton. I have brought with me also letters today from Kelly Air Force Base, dated as late as July 15, 1982, refusing to accept my bids because of the litigation with the Whittaker Corp. We have won all four claims in their case and now we are currently waiting for trial in our $16 million antitrust case, which is filed in the Ninth Circuit Court in Los Angeles.

Mr. SKELTON. On the Armed Services Committee we do our very best to hold down the prices of our military expenditures and this might be one area that we would take a very close look at. It bothers me a great deal to see this. Of course, I am familiar with others in other areas that are comparable to this which are outside the area of aviation. I think that what I will do, what I would like to do is possibly use your testimony, relay it to the appropriate subcommittee chairman on the Armed Services Committee. Quite frankly, this bothers me a great deal to see this type of operation. If we were a commercial purchaser who would buy this bearing for $10 and the Air Force has to pay $75 for it, that is unconscionable.

Mr. MANHAN. Yes, sir, but that is what is going on when you are the only source. There are ASPR's, or armed services procurement regulations. We have pointed them out to the base.

[Regulations referred to above follow:]

(c) The "bulk funding" concept shall be used to the maximum extent practicable to reduce processing delays, double handling, and documentation. Bulk funding is particularly appropriate when numerous purchases using the same type of funds are to be made during a given period.

(d) Installation or activity transportation facilities may be used for delivery from local suppliers to the purchasing installation only after consideration of the following methods:

(i) supplier delivery;
(ii) common carrier;
(iii) parcel post; and
(iv) mail indicia.

(e) Inspection procedures for small purchases shall be in accordance with 14-308.

(f) The use of United States-owned foreign currency in making payments for small purchases shall be in accordance with Section VI, Part 11.

(g) Placement of small purchases with small business concerns, labor surplus area concerns, and minority enterprises shall be encouraged to the extent consistent with the objectives of this Part. When source lists are maintained for procurements not exceeding $10,000, these source lists should include known concerns in these categories. The names of such concerns may be obtained from local SBA and other Federal and private sources which maintain lists of minority enterprises operating in the local area. These enterprises shall be given opportunities, at least equal to other firms, to submit quotations in response to small purchase solicitations.

3-604 Competition and Price Reasonableness.

3-604.1 *Purchases Not in Excess of $500.* Small purchases not exceeding $500 may be accomplished without securing competitive quotations if the prices are considered to be reasonable. Such purchases shall be distributed equitably among qualified suppliers. When practical, a quotation will be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchases not in excess of $500 may more than offset potential savings in detecting instances of overpricing; therefore, action to verify the reasonableness of the price need be taken only when the buyer or contracting officer suspects that, or has information to indicate that, the price may not be reasonable, *e.g.*, comparison to previous price paid, personal knowledge of the item involved.

3-604.2 *Purchases in Excess of $500.*

(a) Solicitation of quotations from a reasonable number of qualified sources of supply shall be made to assure that the procurement is to the advantage of the Government, price and other factors considered, including the administrative cost of the purchase. Generally, solicitation shall be limited to three suppliers and, to the maximum extent possible, shall be restricted to the local trade area of either the purchasing or the receiving activity. If practicable, two sources not included in the previous solicitation should be requested to furnish quotations. Quotations should generally be solicited orally except for construction contracts in excess of $2,000. Written solicitations should be used when (i) the suppliers are located outside the local area, (ii) special specifications are involved, (iii) a large number of line items are included in a single proposed procurement, or (iv) obtaining oral quotations is not considered economical or possible.

(b) Reasonableness of a proposed price should be based on competitive quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract file setting forth the basis of the determination of fair and reasonable price. This determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases, current price lists, catalogs, advertisements, similar items in a related industry, value analysis, the contracting officer's personal knowledge of the item being procured, or any other means. Written records of solicitation may be limited to notes or abstracts to show vendor or vendors contacted, prices, delivery, and any other informal historical data. If a separate form is used for documentation of price reasonableness, DD Form 1784, Small Purchase Pricing Memorandum, shall be used (see 16-813). If this form is not used, the price reasonableness statement shall be based on one or more of the criteria set forth on the form. In any case, the contracting officer should gain as much knowledge as practicable of the physical and material characteristics and intended use of the item to be purchased. When only one source is solicited, an additional notation must be made to explain the absence of competition, except for procurement of utility services available only from one source or of educational services from nonprofit institutions. Notification to unsuccessful suppliers shall be given only if requested.

(c) Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity, which either unreasonably exceeds stated quantity requirements, or results in an unreasonable price for the quantities required. If practicable before placing the order the requiring activity should be informed in such cases of all facts regarding the quotation and requested to confirm or alter its requirement for the item or items under consideration. The file shall be documented to support the final action taken.

3-605 Blanket Purchase Agreement (BPA).

3-605.1 *General*. A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for small quantities of supplies or services by establishing "charge accounts" with qualified sources of supply (see 12-302, 12-602.1 and 12-1001). Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

3-605.2 *Limitation on Use*. A blanket purchase agreement may not be used when a call exceeds $5,000 except that BPA calls up to $10,000 may be placed by Inventory Control Points and calls for subsistence items are unlimited as to dollar value. However, in these cases the *Examination of Records by Comptroller General* clause in 7-104.15 and the *Listing of Employment Openings* clause in 7-103.27 shall be included in the agreement.

7-104.83 *Cost Accounting Standards.*

(a) In accordance with 3-1204, insert the following clause:

COST ACCOUNTING STANDARDS (1975 FEB)

(a) Unless the Cost Accounting Standards Board has prescribed rules or regulations exempting the Contractor or this contract from standards, rules, and regulations promulgated pursuant to 50 U.S.C. App. 2168 (Public Law 91-379, August 15, 1970), the Contractor, in connection with this contract shall:

(1) By submission of a Disclosure Statement, disclose in writing his cost accounting practices as required by regulations of the Cost Accounting Standards Board. The required disclosures must be made prior to contract award unless the Contracting Officer provides a written notice to the Contractor authorizing post-award submission in accordance with regulations of the Cost Accounting Standards Board. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Contractor and which contain this Cost Accounting Standards clause. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement will be protected and will not be released outside the Government.

(2) Follow consistently the cost accounting practices disclosed pursuant to (1) above in accumulating and reporting contract performance cost data concerning this contract. If any change in disclosed practices is made for purposes of any contract or subcontract subject to Cost Accounting Standards Board requirements, the change must be applied prospectively to this contract, and the Disclosure Statement must be amended accordingly. If the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) below, as appropriate.

(3) Comply with all Cost Accounting Standards in effect on the date of award of this contract or if the Contractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data. The Contractor shall also comply with any Cost Accounting Standard which hereafter becomes applicable to a contract or subcontract of the Contractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.

(4)(A) Agree to an equitable adjustment as provided in the changes clause of this contract if the contract cost is affected by a change which, pursuant to (3) above, the contractor is required to make to his established cost accounting practices whether such practices are covered by a Disclosure Statement or not.

(B) Negotiate with the Contracting Officer to determine the terms and conditions under which a change to either a disclosed cost accounting practice or an established cost accounting practice, other than a change under (4)(A) above, may be made. A change to a practice may be proposed by either the Government or the Contractor, *provided*, however, that no agreement may be made under this provision that will increase costs paid by the United States.

(5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if he or a subcontractor fails to comply with an applicable Cost Accounting Standard or to follow any practice disclosed pursuant to subparagraphs (a)(1) and (a)(2) above and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States together with interest thereon computed at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT. 97, or seven percent (7%) per annum, whichever is less, from the time the payment by the United States was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable Cost Accounting Standard, rule, or regulation of the Cost Accounting Standards Board and as to any cost adjustment demanded by the United States, such failure to agree shall be a dispute concerning a question of fact within the meaning of the disputes clause of this contract.

(c) The Contractor shall permit any authorized representatives of the head of the agency, of the Cost Accounting Standards Board, or of the Comptroller General of the United States to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts which he enters into the substance of this clause except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that this requirement shall apply only to negotiated subcontracts in excess of $100,000 where the price negotiated is not based on:

(i) established catalog or market prices of commercial items sold in substantial quantities to the general public, or

(ii) prices set by law or regulation and except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to accept the Cost Accounting Standards clause by reason of Section 331.30(b) of Title 4 Code of Federal Regulations (4 CFR 331.30(b)).

NOTE: (1) Subcontractors shall be required to submit their Disclosure Statements to the Contractor. However, if a subcontractor has previously submitted his Disclosure Statement to a Government Administrative Contracting Officer (ACO) he may satisfy that requirement by certifying to the Contractor the date of such Statement and the address of the ACO.

(2) In any case where a subcontractor determines that the Disclosure Statement information is privileged and confidential and declines to provide it to his Contractor or higher tier subcontractor, the Contractor may authorize direct submission of that subcontractor's Disclosure Statement to the same Government offices to which the Contractor was required to make submission of his Disclosure Statement. Such authorization shall in no way relieve the Contractor of liability as provided in paragraph (a)(5) of this clause. In view of the foregoing and since the contract may be subject to adjustment under this clause by reason of any failure to comply with rules, regulations, and Standards of the Cost Accounting Standards Board in connection with covered subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the Contractor. However, the inclusion of such a clause and the terms thereof are matters for negotiation and agreement between the Contractor and the subcontractor, provided that they do not conflict with the duties of the Contractor under its contract with the Government. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification to be submitted by his subcontractors.

(e) The terms defined in Section 331.20 of Part 331 of Title 4, Code of Federal Regulations (4 CFR 331.20) shall have the same meanings herein. As there defined, "negotiated subcontract" means "any subcontract except a firm fixed-price subcontract made by a Contractor or subcontractor after receiving offers from at least two firms not associated with each other or such Contractor or subcontractor, providing (1) the solicitation to all competing firms is identical, (2) price is the only consideration in selecting the subcontractor from among the competing firms solicited, and (3) the lowest offer received in compliance with the solicitation from among those solicited is accepted."

Mr. SKELTON. In your particular case, you deal with which Air Force base?

Mr. MANHAN. Kelly Air Force Base at San Antonio, and Tinker Air Force Base, in Oklahoma City. We have tried to deal with naval aviation supplies.

Mr. SKELTON. Again, I am sorry I wasn't here for your testimony. I would have asked if you are the only contractor who is running into this type of problem or are there others from your knowledge?

Mr. MANHAN. I would have to say there are others from my knowledge——

Mr. SKELTON. In the field of aviation. I am familiar with other areas. I am talking just about aviation now.

Mr. MANHAN. Yes. It is happening all day long.

Mr. SKELTON. Would you cooperate with the staff member and investigator from the Armed Services Committee if he asked you for some information about this?

Mr. MANHAN. Absolutely.

Mr. SKELTON. Thank you.

Mr. RYAN. Mr. Skelton, I would like to add that as a company we produce a lot of replacement hardware for the U.S. Air Force.

Mr. SKELTON. Who are you now?

Mr. RYAN. NORDAM in Tulsa, Okla. Charles Ryan is my name and we constantly have difficulty getting breakout programs established with the bases to let us competitively bid on these items. The savings have been in the magnitude of $300,000 to $400,000 on a single contract which we have ultimately succeeded in providing to the Air Force. So, I just wanted to reinforce the gentleman's point that there are a number of us involved in this melee.

Mr. WILBUR. Mr. Chairman, I wonder if I could turn to Mr. Siegfried for one additional thought here?

Mr. IRELAND. Absolutely.

Mr. SIEGFRIED. My name is Ray Siegfried, president of the NORDAM Co. I am not going to reiterate what everybody else has said here, but in supporting the Execuair and Superior Air Parts testimony, Mr. Ryan noted that there are over 20,000 PMA's in the industry. That represents probably over 500 manufacturers, different companies that manufacture those PMA's and most of those are small business companies.

Every one of us has a story that we could tell. We could tell some to Mr. Skelton. We could tell some to you on either side of the House you wanted to flop, either military or general aviation or commercial aviation. What you have here today is three or four small companies which have had these problems. If the Regulatory Flexibility Act is not taken into consideration here, most of us will have to go back and find other jobs to do. We just can't survive without PMA's. Now, maybe our company is a little bit more fortunate because we have an overhaul station and manufacture other parts that are not PMA parts. But we all have these sorts of stories that could be confronted or would be confronted if the Flexibility Act was put into effect.

But one other thing should be considered when you are going through the testimony or when you have the FAA over here, and that is of the 20,000 parts that have PMA's, we only represent 23 of those parts. Of that $4.1 or $4.2 million represents those 23 parts, but from the balance of payments point of view, we export over $2 million worth of those $4 million in parts. So, the balance of payments, the General Accounting Office would be interested in knowing, if possible, how much of these 20,000 PMA's in dollar volume goes to the international market because if you are certified by the FAA, you also gain certification to most of the foreign countries through their agreements to recognize our FAA PMA's.

Thank you for allowing me to give this information.

Mr. **Ireland**. Thank you. We appreciate it, gentlemen. Do any of the three of you have anything additional that you want to add to the record? Are you sufficiently satisfied with the description of the hand in the cookie jar pricing system?

Mr. **Wilbur**. We very much appreciate your interest.

Mr. **Ireland**. Our next witness is Mr. Alvin Shapiro, who is counsel for the Avco-Lycoming Co. in Williamsport, Pa.

Mr. **Skelton**. Mr. Chairman.

Mr. **Ireland**. Indeed, Mr. Skelton. I know you want to talk about——

Mr. **Skelton**. I would like to speak about this witness.

Mr. **Ireland**. You are on.

Mr. **Skelton**. This gentleman, Mr. Shapiro, is an extremely well qualified attorney from Kansas City. I have known him for many years. I welcome him to the subcommittee. It is certainly good to have you here today, sir.

Mr. **Ireland**. Mr. Shapiro, I want you to know that we won't hold those remarks against you as you testify.

Mr. **Shapiro**. I didn't know that Mr. Skelton was held in such high repute.

Mr. **Ireland**. We welcome you and your testimony. If you will proceed.

TESTIMONY OF ALVIN D. SHAPIRO, COUNSEL, AVCO-LYCOMING CO., WILLIAMSPORT, PA.

Mr. **Shapiro**. I fully recognize that my testimony is in the vast minority here this morning and that I am probably the only witness who is appearing here to voice support of 77-19C.

Mr. **Ireland**. I might add at this point, Mr. Shapiro, all others were invited from your viewpoint but for some reason declined. So, I wouldn't want our record to show that we have discriminated in any way against both sides of the issue. We need to hear both sides of the issue.

Mr. **Shapiro**. That is exactly right, Mr. Chairman.

Mr. **Ireland**. Anyone can make their own judgment why they are not here.

Mr. **Shapiro**. My name is Alvin Shapiro. I am from Kansas City, Mo. I represent Avco-Lycoming, a manufacturer and developer of aircraft engines and aircraft replacement parts. Mr. Chairman, I am going to read this statement, but I hope you will feel free to interrupt me at any time.

Mr. **Ireland**. We will try not to interrupt you. Let's go through it all and then we can pick up from there.

Mr. **Shapiro**. I appear here chiefly to voice support for the FAA's rulemaking 77-19C. There are several aspects of this rule we do not support. When I say "we," I am talking about Avco-Lycoming. We have previously filed comments with the FAA indicating changes we think should be made. At this time, we have no indication our suggestions have been accepted. However, by and large, we support NPRM 77-19C, and support the manner in which it was made.

Avco-Lycoming is centered in Williamsport, Pa. More than 1,400 families depend on its ability to continue manufacturing and selling aircraft engines and replacement parts. Avco-Lycoming has received a number of commendations and acknowledgments from the SBA for its support and outstanding performance in working with small businesses.

I would like to address, if I may, the specific items the chairman has indicated in his invitation to testify as being within this hearing's areas of concern.

Mr. Chairman, what I am talking about there is in your letter of invitation to testify, you delineated three areas that you say are areas of concern of the committee. The first is whether or not the FAA is implementing the Flexibility Act and, if so, whether it is doing so correctly. We believe there is no question the FAA has properly implemented the Regulatory Flexibility Act. In the course of this rulemaking, which has now stretched out to 5 years, the FAA has made comprehensive reports on the purposes and effects of this rulemaking. Rather than take your time to detail them to you, I have listed them in a footnote to my written statement. If you take the individual requirements set forth in the statute, which is 5 U.S.C. 603, and compare them with the FAA reports specified in the footnote, you will see the FAA has, in fact, complied with all items required by the act. And I fully recognize, and I will assert here, that you may not agree with them. You may not agree with the assessments by the FAA. Certainly, there were many questions posed by the chairman and by the staff this morning, which would indicate disagreement, but they have done it. They have implemented it. I think it is within the rulemaking agency's prerogative.

For your convenience, I have attached to this written statement addendum 1, which is a side-by-side comparison showing the FAA's compliance with the statute, and that is the page immediately following the close of the written statement.

Insofar as the chairman's delineation of a question whether it has done so correctly, I frankly do not know what standard to use to answer whether the FAA has done so correctly. Given the expertise of the agency, its familiarity with the field of air commerce which it regulates and the authority given it by the Congress to promulgate rules such as this, I believe it has done so correctly.

The second area of concern indicated by the chairman is whether or not there was justification for the FAA's certification that 77-19C would not have a significant economic impact on a substantial number of small entities. I do not believe there is any cause for questioning the FAA's certification to this effect. In this respect, 77-19C is addressed chiefly to that method of obtaining PMA's called identicality. Identicality is only one of several means by which PMA's may be obtained. Only a very small percentage of PMA holders have obtained them through identicality. Let me interject here, I heard lots of talk this morning about how many PMA holders there are. I think the 20,000 figure was thrown out, just by the previous witness. I don't question that. I emphasize that only a very small percentage of them were obtained by the identicality method and it is really only a very small percentage.

Mr. **Skelton**. May I interrupt at this point? Where would the remainder of them come from?

Mr. **Shapiro**. There are several methods of obtaining PMA's. One, you can do it through licenses, such as Superior does right now with Avco-Lycoming.

Mr. **Skelton**. OK. Were they overstating the identicality?

Mr. **Shapiro**. I think they were.

Mr. **Ireland**. But do you know?

Mr. **Shapiro**. I don't know the exact——

Mr. **Ireland**. I mean, are you talking about 50 percent, a 100 percent——

Mr. **Shapiro**. I will venture to say it is a single digit percentage.

Mr. **Ireland**. But you don't really know?

Mr. **Shapiro**. I don't really know.

The identicality method is to submit to the FAA a design which the applicant states is identical to that of an already approved part. While in respect to Lycoming parts alone, we are aware of only three business entities which are in the business of trafficking in and obtaining PMA's through identicality. We do not believe three business entities could be called a substantial number of small entities.

We further believe one of those three businesses would not even qualify under the guidelines and directives of the Small Business Administration as a small business. And I might point out that the last witness talked about a business doing $25 million a year. Now, that is hardly a small business.

We understand SBA guidelines to indicate a small business in aircraft engines and parts is one doing less than $5 million a year in sales. We believe Superior to have sales in excess of that figure. With only three businesses——

Mr. **Ireland**. Wait a minute. Before we get too far off of that in this definition of "small business," I would like before we get into the record something that isn't so, let me ask the staff director——

Mr. **Lynch**. Mr. Chairman, in this industry, at present is by number of employees. The present standard SBA will address this in their testimony after this witness—is 1,000 employees and the new proposal is 2,500 employees. So, that is the standard.

Mr. **Ireland**. I think we have to be careful about this area and it comes up all the time.

Mr. **Shapiro**. I have some familiarity with the statute and I think the statute states it has something to do with being dominant in the industry and then also as per the director's setting forth of guidelines and the guidelines I went to happened to be in the volume of dollar sales.

Mr. **Ireland**. That was your choice of guidelines. But the SBA will provide that. I didn't want to interrupt you. I just wanted to call attention to a very real problem of what is a small business before we set that into concrete.

Mr. **Shapiro**. Let me just say what I did. I called the SBA in Kansas City and asked them and they sent over some directives.

Mr. **Ireland**. Well, that is what I want to call attention to and we will get that with the next witness. Thank you.

Mr. **Shapiro**. With only three businesses believed to be affected by these identicality provisions in respect to Lycoming parts, we do not think there is any basis for saying a "substantial number of small entities" would sustain a significant economic impact. We believe the FAA's expertise, its knowledge of the industry and line of commerce it regulates should be accepted. Its assessment and certification in this respect are clearly justified. Indeed, we believe there is no economic effect at all. At the most, these very few holders of PMA's obtained by identicality will simply have to better identify the parts they sell. I don't believe there is any economic effect to that. The third area of concern specified by you, Mr. Chairman, is the safety issue which——

Mr. **Ireland**. We are going to recess if we could and I apologize for the interruption, for such time for us to vote and get back and we will pick up right here.

Mr. **Shapiro**. I will stay right here until you come back.

Mr. **Ireland**. Thank you.

[A brief recess was taken.]

Mr. **Ireland**. Mr. Shapiro, we thank you for your indulgence.

Mr. **Shapiro**. Thank you, Mr. Chairman. I will resume this deathless prose now.

The third concern specified by the chairman is the safety issue which prompted the regulation. When it created the FAA and passed the Federal Aviation Act in 1958, the Congress very specifically said the prime purpose of the FAA was safety. I cite the statute there. The Federal courts have repeatedly affirmed the major and chief objective of the FAA is to insure safety and airworthiness. In the footnote, I have cited a few cases, which have said that. To this end, before aircraft parts can be introduced into air commerce, they must and should be subject to FAA regulations to assure parts which are incorporated in an airplane in which people fly are of some minimum standard.

To assure that these standards are maintained, the FAA requires any engine manufactured by an OEM, such as Avco-Lycoming, first be type-certificated. That is the TCH that we have been talking about. This involves a process of development, research, testing, and inspection, all under FAA supervision, that costs literally millions of dollars for each engine model. Avco-Lycoming fully understands this requirement for safety and willingly accepts the responsibility and costs involved. These costs of development, research, testing, and inspection are not borne by those holders of PMA's obtained by identicality. Those PMA holders contribute nothing to develop the aircraft parts they sell. When they contribute nothing, it costs them nothing and that is why there is such a disparity of prices. You don't get anything for free in this world. If you are going to get safe parts, somebody has to pay for them, and that is the difference between the prices charged by the PMA's, and the prices charged by the OEM's.

Rule 77-19C has to do with the method of manufacturing replacement parts for these type-certificated engines. It goes without saying that the finest engine in the world is of no use 15,000 feet in the air if a single part is defective and fails. Every last one of the hundreds of parts of the engines must be safe. By this regulation, the FAA is attempting to assure that each and every part of these type-certificated engines is proper and safe. The consequences of their not being safe are disastrous. That is the whole basis of the rule. I can't make it more simple. The FAA is simply trying to assure that replacement parts for these aircraft engines are up to certain minimum standards.

As I stated at the beginning, we do not wholly endorse 77-19C. We have made a number of suggestions to the FAA, but there is no indication they have accepted them. We have pointed out the FAA regulations do not go far enough to assure safety in every respect. But we accept the proposed rulemaking as at least a step in the right direction. The right direction, contrary to the inference by the previous testimony, is safety; it is not competition. It is not to knock out competition. I will get to that in a few minutes.

We do not believe people have to be killed and maimed before the FAA is justified upgrading its safety standards or requiring that safety be assured.

In short, Mr. Chairman, 77-19C simply attempts to assure when a PMA applicant, who has obtained his PMA not on the basis of having developed the part himself, but on the basis of identicality, sells parts, they shall meet minimum safety standards and will work in the engines for which they are designed. This is well within the FAA's area of expertise and knowledge. I would be quite surprised if the Congress interfered with this function or demanded there be proof of death or injury before the FAA is allowed to upgrade its safety standards.

To sum up, in response to the three areas you have indicated in your invitation to testify, the FAA has properly complied with the Regulatory Flexibility Act; its certification that there is not a significant economic impact on a substantial number of small entities is justified and the safety reasons for the regulation are present and obvious.

I want to add a comment or two on a few things. As your staff has undoubtedly informed you from their review of the FAA docket, throughout the comments the argument is made that somehow 77-19C is anticompetitive. It has been indicated that OEM's, such as Avco-Lycoming, will somehow be able to enhance a supposed monopolistic position. If you will permit me, I would like to answer these contentions very briefly. In my prepared remarks, and I don't know that I want to go through it, although I will certainly answer all questions.

Mr. **Ireland**. If you would go through those remarks, Mr. Shapiro, it would help us.

Mr. **Shapiro**. In 1974, Superior Air Parts complained to the Justice Department about Avco-Lycoming and some other OEM's. The Justice Department launched an investigation spanning some 3 years. That investigation was closed on June 28, 1978, because it failed to reveal any Sherman Act violations. In 1980, again on complaint from Superior, the Federal Trade Commission initiated an investigation of Avco-Lycoming in the area of aircraft replacement parts. We cooperated fully and I can tell you legal personnel from the FTC came out to Kansas City and spent a couple of days going through our files and reviewing an extensive court record and depositions.

The FTC closed out that investigation on July 1, 1981, finding no violations whatsoever, and no cause to proceed further. I will point out to you that in both of those investigations there was a section 2 Sherman Act monopolization charge, which embodied the very things that we heard here. Both the FTC and the Justice Department found no cause to proceed whatsoever.

In September 1976, Superior filed against Avco-Lycoming a massive antitrust complaint and you have heard about that from Mr. Dedmon and from Mr. Beckman. It was in 14 counts.

Mr. **Skelton**. That is the one that they evidently got an exceptionally good settlement against——

Mr. **Shapiro**. Well, I am going to dispute that one, Mr. Skelton.

Mr. **Skelton**. Is that what they said?

Mr. **Shapiro**. I thought I heard them say that, but I don't believe that that was the case, at least insofar as my client was concerned. They got absolutely nothing, and they recognized our proprietary rights. They dismissed their complaint after 4½ years with prejudice.

Mr. **Skelton**. Are you telling me then it was not settled? It was dismissed.

Mr. **Shapiro**. It was just dismissed. There was a settlement agreement because a license agreement was involved.

Mr. **Skelton**. But it was a suit for damages and nothing was paid. Is that correct?

Mr. **Shapiro**. Absolutely correct, sir. Absolutely correct. That is all the things that we heard about how bad Avco-Lycoming has treated some of the PMA holders here.

Mr. **Skelton**. I was led to believe a while ago a different conclusion was made.

Mr. **Shapiro**. Superior had five different law firms working on it at the same time. The five law firms were from three different cities, including three law firms from Washington.

Mr. **Ireland**. Excuse me, Mr. Shapiro. So, I understand this, being a nonlawyer, there were other manufacturers involved besides the company you represent? Is that correct?

Mr. **Shapiro**. Right. There were other manufacturers involved.

Mr. **Ireland**. They participated in the settlement in different ways than your company?

Mr. **Shapiro**. Now, I may be wrong, but as I recollect—and I have to say that I was in it from day one and I was the one that defended Avco-Lycoming. In about the first year and a half or 2 years, the other four—there were five defendants—the other four settled out. I do not know what considerations there were——

Mr. **Ireland**. I wouldn't want to leave this inferring that a previous witness was not truthful.

Mr. **Skelton**. I just want to know what happened.

Mr. **Ireland**. That is right. You are referring to the part that involved Avco-Lycoming, which you are familiar with. You are not referring to that as the same for the other people in the suit in the settlement.

Mr. SHAPIRO. Mr. Chairman, the charges that were made this morning about monopolistic practices were, except for the gentleman from Los Angeles, were all leveled at Avco-Lycoming and they gave you that correspondence and they gave you all the other things that we supposedly had done. It wasn't directed at these other four. It was directed at Avco-Lycoming.

Mr. IRELAND. I know we are all sensitive, but I think that the questioning that we had that brought out what was not in the testimony was settlement and if I am not incorrect, the gentleman made a general statement about the suit. I am sure you are sensitive about your client, but I think there was a general statement that was made about the settlement.

Mr. SHAPIRO. All right. I see the distinction you are making, sir.

Mr. IRELAND. Thank you, Mr. Shapiro.

Mr. SHAPIRO. During the course of the lawsuit, Superior examined literally hundreds of thousands of Avco documents. It took several dozen depositions of Avco personnel. In February 1981, Superior dismissed its complaint with prejudice without receiving a penny. It also acknowledged Avco-Lycoming's proprietary rights in its drawings and data for these replacement parts. Now, where in the world can you find any indication out of these facts that there is an anticompetitive situation in the aircraft replacement parts industry?

Nor can it be said that 77-19C would in any way achieve an anticompetitive effect. All it does is allow the FAA to keep better watch on the use of PMA's. It does not prevent Superior or any other distributor from obtaining PMA's by engineering their own parts or from reverse engineering. They can still obtain PMA's on the basis of identicality. Indeed, it facilitates the use of identicality by only requiring a certification on the applicant's own word as to such identicality. In short, there is nothing anticompetitive about 77-19C. The extensive investigations by the Justice Department, by the FTC and by Superior itself in prosecuting its lawsuit proves there is no monopolistic tendency in this industry, and 77-19C does not in any way promote monopolization.

The alarmist statements that Superior or others may be put out of business by 77-19C hide the fact that Superior can still obtain PMA's by identicality and still has available to it alternative methods to obtain PMA's other than identicality; 77-19C does not change those other methods.

It should be understood those few holders of PMA's obtained through identicality already enjoy a significant economic advantage over the OEM's. They do not incur the large amounts of money required to research, develop, test and certify engines and replacement parts. They get a free ride. What Superior and the other PMA holders are really arguing for is a continuation of the decided economic advantage they now enjoy. To the extent that 77-19C permits the FAA to require testing of parts, it may indeed cost the holders of PMA's obtained by identicality additional money they do not spend now. Such a requirement would only reduce their current economic advantage. It does not affect the vast majority of other PMA holders who do not obtain their PMA's through identicality.

We anticipate it will also be claimed 77-19C puts the FAA in the role of being a policeman to assure there has been no misappropriation of proprietary rights. Unfortunately, this is not true. It has been our belief based on substantiated facts that identicality does indeed foster industrial espionage. The Justice Department has agreed with us and has so stated, even while endorsing identicality and it did so in its comments filed January 4, 1978. Our belief is that people who engage in industrial espionage are not the type of people who are likely to produce safe parts. They tend to cut corners. Unfortunately, we have not been able to persuade the FAA to this effect; 77-19C does not take steps to assure that identicality will not result in misappropriation of proprietary drawings and data. We wish it did, but it doesn't.

Finally, if I may, I would like to comment on these proceedings. I have already alluded to the fact that Superior caused the Justice Department to undertake a 3-year investigation, that it caused the FTC to undertake a fruitless 1-year investigation, that it invoked the processes of the Federal courts in a 4½-year antitrust suit that came up empty; 77-19C was first proposed in 1977. Since that time a virtual filibuster has been conducted against it. The file in docket 17147, which covers 77-19, indicates Superior has requested and received a number of extensions to file comments and to file still more comments and more comments. It has caused the Justice Department to file two sets of comments. It has attempted to involve the services of the Office of Management and Budget. Now, claiming to be a small business, it has brought the FAA's rulemaking to this room by employing the SBA and this committee to help it in its filibuster. After 5 years, we respectfully submit the FAA should be allowed to proceed with its rulemaking. The filibuster has lasted long enough. It has resulted in the expenditure of literally hundreds of thousands of dollars in the time of Government personnel. We believe the FAA should be allowed to proceed without further interference.

That completes my prepared statement and I thank the committee.

[Mr. Shapiro's prepared statement follows:]

PREPARED STATEMENT OF ALVIN D. SHAPIRO, COUNSEL, AVCO-LYCOMING, WILLIAMSPORT, PA.

My name is Alvin Shapiro. I am from Kansas City, Missouri. I represent Avco-Lycoming, a manufacturer and developer of aircraft engines and aircraft replacement parts.

I appear here chiefly to voice support for the FAA's rulemaking 77-19C. There are several aspects of this rule we do not support. We have previously filed comments with the FAA indicating changes we think should be made. At this time, we have no indication our suggestions have been accepted. However, by and large, we support NPRM 77-19C and support the manner in which it was made.

Avco-Lycoming is centered in Williamsport, Pennsylvania. More than 1,400 families depend on its ability to continue manufacturing and selling aircraft engines and replacement parts. Avco-Lycoming has received a number of commendations and acknowledgements from the SBA for its support and outstanding performance in working with small businesses.

I would like to address, if I may, the specific items the Chairman has indicated in his invitation to testify as being within this hearing's areas of concern.

The first is whether or not the FAA is implementing the Regulatory Flexibility Act and, if so, whether it is doing so correctly. We believe there is no question the FAA has properly implemented the Regulatory Flexibility Act. In the course of this rulemaking, which has now stretched out to five years, the FAA has made comprehensive reports on the purposes and effects of this rulemaking. Rather than take your time to detail them to you I have listed them in a footnote to my written statement./* If you take the individual requirements set forth in the statute, 5 U.S.C. § 603, and compare them with the FAA reports specified in the footnote, you will see the FAA has in fact complied with all items required by the Act. For your convenience, I have attached to this written statement Addendum No. 1 which is a side-by-side comparison showing the FAA's compliance with the statute./**

I frankly do not know what standard to use to answer whether the FAA has done so correctly. Given the expertise of the agency, its familiarity with the field of air commerce which it regulates, and the authority given it by the Congress to promulgate rules such as this, I believe it has done so correctly.

The second area of concern indicated by the Chairman is whether or not there was justification for the FAA's certification that 77-19C would not have a significant economic impact on a substantial number of small entities. I do not believe there is any cause for questioning the FAA's certification to this effect. In this respect, 77-19C is addressed chiefly to that method of obtaining PMA's called "identicality". "Identicality" is only one of several means by which PMA's may be obtained. Only a very small percentage of PMA holders have obtained them through "identicality . The "identicality" method is to submit to the FAA a design which the applicant states is "identical" to that of an already approved part.

In respect to Lycoming parts alone, we are aware of

/* 43 F.R. No. 72, p. 15432; 42 F.R. No. 231, p. 61048; 42 F.R. No. 170, pp. 43985-8; Regulatory Evaluation, PMA [Docket No. 17147]; 46 F.R. No. 10, pp. 3776-80; 46 F.R. No. 141, pp. 38062-3.

/** Addendum No. 1, p. A-1, attached hereto.

only three business entities which are in the business of trafficking in and obtaining PMA's through "identicality". We do not believe three business entities could be called "a substantial number of small entities".

We further believe one of those three businesses would not even qualify under the guidelines and directives of the Small Business Administration as a small business. We understand SBA guidelines to indicate a small business in aircraft engines and parts is one doing less than $5 million a year in sales./* We believe Superior Air Parts to have sales in excess of that figure. With only three businesses believed to be affected by these "identicality" provisions in respect to Lycoming parts, we do not think there is any basis for saying a "substantial number of small entities" would sustain a significant economic impact. We believe the FAA's expertise, its knowledge of the industry and line of commerce it regulates should be accepted. Its assessment and certification in this respect are clearly justified.

Indeed, we believe there is no economic effect at all. At the most, these very few holders of PMA's obtained by "identicality" will simply have to better identify the parts they sell. There is no economic effect in that.

The third area of concern specified by the Chairman is the safety issue which prompted the regulation. When it created the FAA and passed the Federal Aviation Act in 1958, the Congress very specifically said the prime purpose of the FAA was safety, 49 U.S.C. §§ 1421(a) and (b). The federal courts have repeatedly affirmed the major and chief objective of the FAA is

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/* SBA Regulations, Part 121, Small Business Size Standards, at p. 326, § 121.3-16.

to insure safety and airworthiness./* To this end, before aircraft parts can be introduced into air commerce, they must and should be subject to FAA regulations to assure that parts which are incorporated in an airplane in which people fly are of some minimum standard.

To assure that these minimum standards are maintained, the FAA requires that any engine manufactured by an OEM such as Avco-Lycoming, first be type-certificated. This involves a process of development, research, testing and inspection, all under FAA supervision, that costs literally millions of dollars for each engine model. Avco-Lycoming fully understands this requirement for safety and willingly accepts the responsibility and costs involved. These costs of development, research, testing and inspection are not borne by those holders of PMA's obtained by "identicality". Those PMA holders contribute nothing to develop the aircraft parts they sell.

Rule 77-19C has to do with the method of manufacturing replacement parts for these type-certificated engines. It goes without saying that the finest engine in the world is of no use 15,000 feet in the air if a single part is defective and fails. Every last one of the hundreds of parts of the engines must be safe. By this regulation, the FAA is attempting to assure that each and every part of these type-certificated engines is proper and safe. The consequences of their not being safe are disastrous. That is the whole basis of this rule. I can put it no more simply than that. The FAA is simply trying to assure that replacement parts for these aircraft engines are up to certain minimum standards.

/* See, *e.g.*, *Doe* v. *D.O.T.*, 412 F. 2d 674, 677 (8th Cir. 1969); *Pike* v. *CAB*, 303 F. 2d 353, 355-6 (8th Cir. 1962); *Nadiak* v. *CAB*, 305 F. 2d 588, 590-1 (5th Cir. 1962), *cert*. *den*. 372 U.S. 913.

As I stated at the beginning, we do not wholly endorse 77-19C. We have made a number of suggestions to the FAA but there is no indication they have been accepted./* We have pointed out the fact that the FAA's regulations do not go far enough to assure safety in every respect. But we accept the proposed rulemaking as at least a step in the right direction. We do not believe people have to be killed and maimed before the FAA is justified in upgrading its safety standards or in requiring that safety be assured.

In short, Mr. Chairman, 77-19C simply attempts to assure that when a PMA applicant, who has obtained his PMA not on the basis of having developed the part himself, but on the basis of "identicality", sells parts they shall meet minimum safety standards and will work in the engines for which they are designed. This is well within the FAA's area of expertise and knowledge. I would be quite surprised if the Congress interfered with this function, or demanded that there be proof of death or injury before the FAA is allowed to upgrade its safety standards.

To sum up: In response to the three areas of concern you have indicated in your invitation to testify, the FAA has properly complied with the Regulatory Flexibility Act; its certification as to there not being a significant economic impact on a substantial number of small entities is certainly justified; and safety reasons for the regulation are present and obvious.

If I may, I would like to add a comment or two about what I believe are the real reasons for this hearing.

/* We attach hereto as an Appendix to this Statement the latest of the Comments which we filed on September 21, 1981.

As your staff has undoubtedly informed you from their review of the FAA's docket on this rule, throughout the Comments the argument is made that somehow 77-19C is anticompetitive. It has been indicated that OEM's, such as Avco-Lycoming, will somehow be able to enhance a supposed monopolistic position. If you will permit me, I would like to answer these contentions very briefly:

In 1974, Superior Air Parts complained to the Justice Department about Avco-Lycoming. The Justice Department launched an investigation spanning some three years. That investigation was closed out on June 28, 1978, because it failed to reveal any Sherman Act violations. In 1980, again on complaint from Superior, the Federal Trade Commission initiated an investigation of Avco-Lycoming in the area of aircraft replacement parts. We cooperated fully and I can tell you legal personnel from the Federal Trade Commission came out to Kansas City, and spent a couple of days going through our files and reviewing an extensive court record and depositions. The FTC closed out that investigation on July 1, 1981, finding no violations whatsoever and no cause to proceed further. In September, 1976, Superior filed against Avco-Lycoming a massive antitrust complaint. It was in fourteen counts and included several charges of § 2 Sherman Act monopolization. Superior had five different law firms working on it at the same time. The five law firms were in three different cities, including three law firms here in Washington. It examined literally hundreds of thousands of Avco documents. It took several dozen depositions of Avco personnel. In February, 1981, Superior dismissed its complaint with prejudice without receiving a penny. It also acknowledged Avco-Lycoming's proprietary rights in its drawings and data for these replacement parts.

Now, where in the world can you find any indication out of these facts that there is an anti-competitive situation in the aircraft replacement parts industry?

Nor can it be said 77-19C would in any way achieve an anti-competitive effect. All it does is allow the FAA to keep better watch on the use of PMA's. It does not prevent Superior or any other distributor from obtaining PMA's by engineering their own parts, or from reverse-engineering. They can still obtain PMA's on the basis of "identicality". Indeed, it facilitates the use of "identicality" by only requiring a certification on the applicant's own word as to such "identicality". In short, there is nothing anti-competitive about 77-19C. The extensive investigations by the Justice Department, by the FTC and by Superior itself in prosecuting its unsuccessful lawsuit are proof there is no monopolistic tendency in this industry and 77-19C does not in any way promote monopolization.

The alarmist statements that Superior or others may be put out of business by 77-19C hide the fact that Superior can still obtain PMA's by "identicality" and still has available to it alternative methods to obtain PMA's other than "identicality". Rule 77-19C does not change these other methods.

It should be understood those few holders of PMA's obtained through "identicality" already enjoy a significant economic advantage over the OEM's. They do not incur the large amounts of money required to research, develop, test and certify engines and replacement parts. They in effect get a "free ride". What Superior and the other PMA holders are really arguing for is a continuation of the decided economic advantage they now enjoy. To the extent that 77-19C permits the FAA to require testing of parts, it may indeed cost the holders of PMA's obtained by "identicality" additional money they do not now spend. Such a requirement would only reduce their current economic advantage. It does not affect the vast majority of other PMA holders who do not obtain their PMA's through "identicality".

We anticipate it will also be claimed 77-19C puts the FAA in the role of being a policeman to assure there has been no misappropriation of proprietary rights. Unfortunately, this is not true. It has been our belief based on substantiated facts that "identicality" does indeed foster industrial espionage. The Justice Department has agreed with us, and has so stated, even while endorsing "identicality", in its Comments filed on January 4, 1978, at p. 12. Our belief is that people who engage in industrial espionage are not the type of people who are likely to produce safe parts. They tend to cut corners. Unfortunately we have not been able to persuade the FAA to this effect and 77-19C does not take steps to assure that "identicality" will not result in misappropriation of proprietary drawings and data. We wish it did.

Finally, if I may, I would like to comment on these proceedings. I have already alluded to the fact that Superior caused the Justice Department to undertake a fruitless three-year investigation of Avco-Lycoming; that Superior caused the FTC to undertake a fruitless one-year investigation of Avco-Lycoming; and that Superior has invoked the processes of the federal courts in a four-and-a-half year antitrust suit that came up empty. Rule 77-19 was first proposed on 1977. Since that time a virtual filibuster has been conducted against it. The file in FAA Docket 17147 indicates Superior has requested and received a number of extensions to file comments and to file still more comments. It has caused the Justice

Department to file two sets of comments. It has attempted to involve the services of the Office of Management and Budget. Now, claiming to be a small business, it has brought the FAA's rulemaking to this room by employing the Small Business Administration and this Committee to help it in its filibuster. After five years, we respectfully submit the FAA should be allowed to proceed with its rulemaking. The filibuster has lasted long enough. It has resulted in the expenditure of literally hundreds of thousands of dollars in the time of government personnel. We believe the FAA should be allowed to proceed without further interference.

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ADDENDUM NO. 1

Regulatory Flexibility Act Requirements (5 U.S.C. § 603)	FAA Compliance
1. describe impact on small entities; § 603(a)	1. 46 FR No. 10, p. 3780, 46 FR No. 141, p. 35063; [no significant impact on substantial number of small entities.]
2. describe reasons why action considered; § 603(b)(1)	2. 42 FR No. 170, pp. 43986, *et seq.*; 46 FR No. 10, at p. 3376
3. objectives and legal basis; § 603(b)(2)	3. 42 FR No. 170, pp. 43986, *et seq.*; 46 FR No. 10, at pp. 3776, *et seq.*, and at p. 3780
4. describe small entities to which would apply; § 603(b)(3)	4. 46 FR No. 10, p. 3780; 46 FR No. 141, p. 38063 [no significant impact on substantial number of small entities.
5. describe compliance requirements; § 603(b)(4)	5. 42 FR No. 170, pp. 43986, *et seq.*; Regulatory Evaluation, PMA [Docket No. 17147], pp. 1-3.
6. identify federal rules, if any, which duplicate, overlap or conflict; § 603(b)(5)	6. No such rules to identify.
7. describe significant alternatives which accomplish stated objectives; § 603(c)	7. Current rule FAR 21.303, *et seq.*; 42 FR No. 170, pp. 43986, *et seq.*; Regulatory Evaluation, PMA [Docket No. 17147], pp. 2-3; 46 FR No. 10, pp. 3776-3779.

APPENDIX

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

	§	
Notice of Proposed Rule Making 77-19C	§ §	
	§	Docket No. 17147
Parts Manufacturer Approvals; Falsification of Airworthiness Certification Documents	§ § §	
	§	

REPLY COMMENTS OF AVCO-LYCOMING

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September 21, 1981

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

§
Notice of Proposed Rule §
Making 77-19C §
§
Parts Manufacturer Approvals; § Docket No. 17147
Falsification of Airworthiness §
Certification Documents §
§

REPLY COMMENTS OF AVCO-LYCOMING

I. INTRODUCTION

These Reply Comments are in response and are chiefly addressed to the Comments submitted August 24, 1981, by the U.S. Department of Justice and by Superior Air Parts, Inc.

Before dealing specifically (in II., below) with such Comments, a few general observations may be appropriate:

A. Basic Position of Justice Department.

We deal below (see I.C.(2) and II.D., *infra*) with the Justice Department's unwarranted foray into the substantive and procedural aspects of regulating air commerce and of this rule making. But even where it has confined itself to its proper role of commenting on possible effects on competition, its statements are wholly erroneous.

As opposed to Justice Department *theories* on anti-competitive effect are the *facts*:

(a) On complaint by Superior in early 1974, the Antitrust

Division investigated the manufacture and distribution of aircraft engine replacement parts. This investigation spanned more than three years. It was closed out on June 28, 1978, because it failed to reveal Sherman Act violations.

(b) Once again, based at least in part on a complaint by Superior, the Federal Trade Commission initiated a separate investigation in about August, 1980. Avco-Lycoming cooperated fully. The FTC closed it out on July 1, 1981, in that it had failed to develop information warranting further action.

(c) In September, 1976, Superior itself filed against Avco-Lycoming a massive antitrust complaint, in fourteen (14) counts, 28 pages long. It included a § 2, Sherman Act charge of monopolization. Extensive pretrial discovery spanned more than four years and was undertaken in Superior's behalf by five law firms in three different cities. Superior examined literally hundreds of thousands of Avco and other industry documents. It took several dozen depositions of Avco personnel and of other industry members. Evidence as to monopoly, antitrust violations or anticompetitive effect was so non-existent that Superior in February, 1981, dismissed its complaint entirely and with prejudice.

Failure to find any indication of anticompetitive tendency in the course of two government investigations and one antitrust suit should be compelling evidence that Justice Department fears are based on erroneous and unjustified assumptions.

In view of these three exhaustive actions, by the Justice Department, by the FTC, and by Superior, armed either with governmental investigative powers or with the discovery weapons available in federal courts, and in view of their utter failure to find any sort of existing or threatened monopoly, how can the Justice Department (and Superior) here claim anti-competitive effects will result from this rule?

B. Basic Position of Superior.

Superior's basic position is opposition to any FAA regulation of replacement parts. During its Comments, it registers:

(a) Objection to any data comparison by the FAA. This regardless of the impact of such omission on airworthiness of the part in question and thus on air safety.

(b) Objection to properly identifying the part and the version for which application for PMA is being made.

(c) Objection to any testing required of parts produced under PMA approval, once again ignoring safety and airworthiness considerations.

(d) Objection to properly and completely identifying parts introduced into air commerce by appropriate markings.

(e) Objection to providing the FAA information necessary for it to properly discharge its responsibilities with respect to airworthiness of parts and to air safety. Information as to location of the actual manufacture of parts is and has been justified by the FAA in preambles to Amendments 21-38 (1972) and 21-41 (1975) as necessary to permit surveillance of the manufacturing process.

(f) Objection to penalties for improper action and false certification.

In short, Superior (and the Justice Department) challenge all actions proposed by the FAA. It also argues adoption of NPRM 77-19C will result in destruction of its business. This is as untrue as the Justice Department theories of monopoly.

C. Additional Observations.

1. "Identicality" Not Exclusive. Both Justice Department and Superior Comments are premised on the fundamental misconception that the only method by which a PMA may be obtained is through the "identicality" method. This is absolutely incorrect. There are several other methods specified in the regulations whereby PMA's may be obtained. The broad statements in both Comments inferring that "identicality" is the only method by which a PMA may be obtained are inaccurate.

2. Justice Department Role. In its Comments, the Justice Department goes far beyond its authorized role. In 1978, the Justice Department cited 28 CFR § 0.40 (1976) as authority for it to appear in administrative proceedings which may require "consideration of the antitrust laws or competitive policies". Here, the Justice Department has not been content to relegate itself to so limited a role. Instead, it undertakes extensive attack on the methods, procedures and even legality of the FAA's proposed rule. While the Antitrust Division may have expertise in its field, there is no indication it has any expertise in respect to manufacture and distribution of aircraft replacement parts.

3. Safety Prime Consideration. While nominal deference to the FAA's responsibilities is paid, both the Justice Department and Superior conveniently forget the prime consideration of the FAA has always been and must always be safety, 49 USC § 1421(a) and (b). Considerations of economic theory and supposedly encouraging competition must always yield to the FAA's main statutory function, which is to promote air safety. It is obvious NPRM 77-19C is

manifestly directed toward enhancement of air safety. Yet both the Justice Department and Superior continually down-grade such requirement to advance (a) in Superior's Comments its own economic well-being, and (b) in the Justice Department Comments its own ill-formed (and erroneous) ideas of competition. Those provisions in NPRM 77-19C patently directed to advance safety (e.g. testing, identifying suppliers, etc.) are railed at because there supposedly is no "proof" safety requires them. Even if the FAA's experience and expertise in the field of air safety were required to be "proven" (and it is not so required), both the Justice Department and Superior would have the FAA relegate safety to a position inferior to Superior's economic health and to the Justice Department's erroneous economic theories.

4. Eliminate "Identicality". The misinterpretations and misconceptions evidenced by the two Comments further reinforce our previously expressed proposal that the FAA consider eliminating "identicality"./* As pointed out in I.C.(1), above, "identicality" is only one of a number of methods of obtaining PMA's. Its elimination would cut through much of the confusion manifested, exhibited and, indeed, engendered by the Comments.

5. Industrial Espionage. Although the Justice Department erroneously seeks to retract and explain away its previous statement,

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/* Superior's recitation of the "history" of "identicality" is largely erroneous. "Identicality" has not been in existence for 25 years, but was introduced only in 1972 by Amendment 21-41 to FAR Part 21. As pointed out in our Comments of April 10, 1981, its almost ten-year history has been one of continual confusion, backtracking, controversy, and encouragement of illicit and improper methods. There have been at least five lawsuits generated by "identicality".

there is little question that "identicality" advances industrial espionage and promotes entry into the PMA field of persons willing to use improper methods of obtaining PMA's. Encouragement of industrial espionage would be eliminated and safety advanced by abrogation of "identicality".

6. Certification. Although these Reply Comments largely support NPRM 77-19C, we again note that the applicant "certification" method of obtaining PMA's is far too lenient, and will further encourage entry into the PMA field of persons whose integrity is questionable. In our original Comments on NPRM 77-19C (of April 10, 1981), we attempted to point out that, as the Justice Department admits, "identicality" almost always assures industrial espionage. Persons who indulge in industrial espionage will generally not hesitate to "certify" the "identicality" of submitted drawings for which PMA's are sought. "Identicality" should be eliminated. But if it is to be retained, the existing method of FAA data comparison should also be continued. Allowing PMA approval by applicant certification will not satisfy the statutory safety requirements imposed on the FAA to assure airworthiness and safety.

7. "Bogus" Parts. Superior predicts, see p. 6, Superior Comments, that if the FAA adopts the proposed regulations, clearly intended to insure safety of air replacement parts, it will thereby be encouraging "bogus" parts. In other words, the FAA is warned not to upgrade standards for safety, because such upgrading, it is claimed, will bring back "bogus" parts. It is admittedly difficult to follow such reasoning. A revival of "bogus" parts is not likely to result from upgrading standards if only because the "bogus" part problem has never left. The existing regulations

have not eliminated "bogus" parts, as witness recent incidents involving both Boeing and Bell Helicopter.

* * * * * *

With these introductory observations, we may now turn to the Justice Department and Superior Comments.

II. DISCUSSION

A. Safety Supports NPRM 77-19C.

Both Justice Department and Superior attack (not merely comment upon) NPRM 77-19C. They claim the proposed rule making is not justified by safety considerations. Each aspect of NPRM 77-19C is in fact founded upon good and obvious reasons of safety.

(1) Revision data. Extensive criticism is made of the proposed requirement that PMA applications contain revision data. Before further discussion, it must be clearly understood this provision does not affect currently-held PMA's Nowhere in the proposed regulations is there any indication presently approved PMA's will be rescinded or require modification.

Contrary to Justice Department and Superior claims as to revisions being "frivolous", the record shows it is experience gained from use of the part after its initial introduction which causes changes. Such revision invariably results in an improved part, enhancing safety. OEM revisions result from considered judgement as to service and safety of both the affected part and those with which it interfaces. All revisions are submitted for FAA approval before use. The FAA would certainly withhold such approval if the revision were truly "frivolous".

Inclusion of revision designations will help identify parts which have failed and for which review and/or change may be required.

The charge is made that revision designations "have no relation to airworthiness", see p. 16, Superior Comments, but no authority is given for such statement. Rather, knowledge of the revision is indeed a positive element of safety. When improvements are made in an aircraft part, revisions are made. Remembering that the proposed regulation will not prevent the PMA holder from manufacturing the original version, certainly the user is entitled to know if the part he buys is of the latest and safest configuration.

(2) Testing of Parts. Superior labels NPRM 77-19C's proposal for testing of certain parts as "frivolous" and an "unjustified drain on the private economy". (See p. 18, Superior Comments). Rather, it is quite clear the FAA's ability to require testing of replacement parts is safety-oriented and designed to provide assurance of airworthiness. To this extent, it is no different than requirements for testing prior to type certification. The FAA has very logically stated its prerogative to require testing is justified by its experience that different manufacturers may, because of differences in production, produce varying parts, even though supposedly manufactured to identical design, as indeed the Justice Department concedes, see Comments, at p. 16.

This reasonable conclusion is obviously based on common sense and experience. Instead of accepting it, Superior claims there is no study in existence to support it.

Rather than arguing against a supposed lack of "proof" that testing will improve safety and airworthiness, the real fact is, as both Comments admit, testing is not wanted because it costs money. The Justice Department mentions the "high cost of passing the testing requirement", see p. 5, Justice Department Comments. Superior concedes, "Testing requires hundreds of thousands of dollars of expense and hundreds of man hours," see p. 18, Superior Comments. In other words, the real complaint is not that testing is not justified by safety, or that there is no proof of such justification. Rather, it is that testing costs money, thus raising prices or reducing profits.

The proposal to require testing of certain precision parts is clearly directed at enhancing safety. Parts produced from the same data but in different facilities can perform differently. They may not withstand the same stresses. In most instances, this cannot be ascertained without performing appropriate tests. Certainly, the FAA should have authority available to require tests if its expertise indicates they are needed. It has never been questioned by the industry that the FAA has the right to require testing at any time considered necessary in the discharge of its responsibilities for aviation safety. This portion of the proposed rule making is no more than a specific statement of such already existing authority.

That such possible testing may cost a PMA holder money is not only irrelevant, in view of the FAA's statutory purpose of assuring airworthiness, but is also economically unsupportable (See II. E., below).

(3) Marking requirements. Objections to addition of a revision designation as part of the marking requirement (FAR 45.15) are unwarranted. Addition of a single digit to markings already

required would have an insignificant impact on production costs and could hardly cause the dire consequences predicted.

Safety considerations require the ability to positively and quickly identify a defective part, not only by basic part number but by the actual revision under which it was produced. Such information is essential in any investigation, in order to establish without delay the specific version of the part in question. This permits any direct action necessitated by a defect and thus prevent any further injury. Additionally, should the situation warrant, it will permit immediate withdrawal of parts from use and/or establishment of requirements for periodic inspection until parts of that configuration are replaced.

(4) Names and addresses of suppliers. This has been considered in NPRM's and subsequent rule making since 1969. Detailed justification for retention of this requirement not only is included in NPRM 77-19C, but also in the preambles to Amendments 21-38 and 21-41 to FAR Part 21. In view of such history, we fail to understand Superior's characterization of it as a "novel requirement", see p. 24, Superior Comments. The intent of such regulation is obviously to permit the FAA to establish effective surveillance of suppliers' facilities without first contacting the PMA holder. Surveillance is clearly to insure that proper manufacturing processes are being followed and thus safety engendered. We fail to understand how in view of this obvious aid to safety it can be called "impractical" and "irrelevant information", "superflouous and burdensome", see pp. 24-25, Superior Comments. Superior sees this as "one more impediment erected for the purpose of destroying the PMA system", see p. 25. Rather, it is very clearly an effective method of allowing the FAA to conduct necessary

inspections to assure safety and airworthiness.

(5) "Less restrictive alternatives". Not satisfied with its claim that safety does not justify the above proposals, the Justice Department (see p. 7, Justice Department Comments) proposes "less restrictive alternatives". It proposes that the FAA interpret "identicality" less strictly, all in the name of supposedly increasing competition. With all due respect, the Justice Department's foray into the field of air commerce regulation is grossly misguided.

We have previously, in our Comments filed in Docket No. 17147 on May 15, 1978, called attention to the fact that, if anything, "identicality" has allowed PMA holders to get a "free ride" economically by competing with the OEM's without any costs of research, development, testing and certification. The OEM's must undergo such costs to obtain a type certificate.

B. Ultra vires. Superior's Comments presents the surprising theory, at p. 26, that the proposed sanctions for false certification are ultra vires. The claim is made that while the FAA may have the authority to suspend or revoke licenses or certificates, it does not have the authority to suspend or revoke approvals, specifically Parts Manufacturer Approvals. This contention is in error. There is precedent for proposed § 21.2.

In FAR § 43.12, it is stated, 14 CFR (1980) at p. 774,

> "(a) No person may make or cause to be made:
>
> "(1) Any fraudulent entry in any record or report that is required to be kept, made, or used to show compliance with any requirement under this part;
>
> "(2) Any reproduction, for fraudulent

> purpose of any record or report under this part; or
>
> "(3) Any alteration, for fraudulent purpose, of any record or report under this part.
>
> "(b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for suspending or revoking the applicable airman, operator, or production certificate, Technical Standard Order Authorization, FAA-Parts Manufacturer Approval, or Product and Process Specification issued by the Administartor and held by that person" [emphasis supplied]

In view of such specific precedent, it is difficult to understand how Superior can claim the FAA does not have the authority to use a false certification as a basis to revoke or suspend PMA's. The Federal Aviation Act, see, e.g., 49 U.S.C. §§ 1341, 1343, 1421, 1429, empowers the Administrator to promulgate regulations deemed necessary for proper discharge of the responsibilities with which he is charged. Clearly the above-quoted § 43.12 and the proposed § 21.2 are well within such authority.

Equally fallacious is the assertion that PMA holders are being singled out "to be threatened with the most severe sanctions in American regulatory history," Superior Comments, at p. 27. It is frankly quite difficult to comment on so extreme an assertion. Although we do not favor the change from data comparison to applicant certification as a basis for PMA approval, there must be penalties for false certification. The FAA proposal incorporates the most effective type of sanction -- revocation or suspension of not only the PMA for which the false statement was made but possibly other PMA's held by one who was willing to swear falsely. The manufacture and distribution of aircraft replacement parts is not a game; people's lives depend on the safety of these parts.

C. Supposed procedural defects. Much feverish argument is made to claim that somehow the FAA's rule making requires specific "proof" for each and every aspect of the proposed regulation. This is not a jury trial. There are no such requirements. Both the Congress in enacting the Administrative Procedure Act, and the courts in interpreting such Act, have repeatedly stated and held a regulatory agency may rely on its own expertise in the rule making process and need not muster specific evidence in the record or document each aspect of a proposed rule.

The U.S. Supreme Court's latest decision in this area is Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Counsel, Inc., 435 U.S. 514, 55 L. Ed. 2d 46 (1978). In that case, the Supreme Court emphatically stated and held a regulatory agency has extensive authority to fashion its own rules and procedures without court interference. In Vermont Yankee, the Supreme Court quoted, 435 U.S., at p. 525, from its previous decision in FCC v. Schreiber, 381 U.S. 299, 290, 14 L. Ed. 2d 383 (1965) where it referred to

> "[C]ongressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adopted to the peculiarities of the industry and the tasks of the agency involved."

See also FCC v. National Citizens, etc., 436 U.S. 775, 56 L. ed. 2d 697. Even the case cited and relied on, U.S. v. Nova Scotia, etc., 568 F. 2d 240 (2d Cir., 1977), states, at p. 251:

> "[A]n agency may resort to its own expertise outside a court in an informal

rule making procedure * * *."

The key point overlooked is the difference between rule making proceedings, such as this, and an enforcement or adjudicative action. The cases cited are chiefly in the enforcement or adjudicative area. They do not involve rule making, such as this. See ALPA v. Quesada, 276 F. 2d 892 (2d Cir. 1960). In Quesada, the Second Circuit upheld FAA rule making as to pilot age. It ruled the FAA did not have to have either "proof" or a hearing. It cited and quoted, 276 F. 2d, at p. 896, Mr. Justice Holmes for the well-settled proposition that even agency rule making which may adversely -- and seriously-- affect persons or property need not be "litigated", either before the agency or in court. The agency's experience and expertise is sufficient.

It is also claimed notice was supposedly inadequate. The actual record shows NPRM 77-19C was published January 8, 1981, With various extensions, the comment period ends September 21, 1981. Certainly more than eight months should be adequate time for developing and stating a position.

Complaint is also made that NPRM 77-19C does not fairly state or adequately give notice as to the changes it intends to make. See, *e.g.*, Superior Comments, at pp. 8, *et seq*. It says that while NPRM 77-19C states it will eliminate data comparison, it in fact retains it. In truth, Superior seeks to eliminate data comparison completely. By complaining as to a supposed procedural defect, it is actually objecting to *any* change.

In seeking to eliminate any sort of data comparison, Superior appears to desire that the FAA rely completely on certification by the applicant himself. It seeks, in effect, to bar the FAA from making any attempt to compare data. The proposed rule does, in fact, lessen administrative burden by requiring the FAA to compare applicant data with only a single set of FAA-approved data. But Superior does not even want that. It wishes to tie the FAA's hands, eliminating any and all inspection of facilities; any and all data comparison. It also wants to eliminate testing (see II.A.(2), above). When all is said and done, it really wants to eliminate all surveillance of its operations by the FAA.

In other words, although it objects to supposed procedural defects, Superior actually seeks to produce and sell parts with no supervision, no inspection, no testing. It wishes to do away with FAA comparison for safety. Such position is not supportable.

We read the proposed regulation to permit elimination of data comparison as a requirement of design approval. Henceforth, the applicant's certification as to "identicality" may be relied on. To that extent, administrative burden is certainly reduced. However, we believe the proposed regulation intends to -- and should -- retain the ability to compare the PMA holder's data with the approved design, if only as a function of production surveillance. This is clearly necessary in the interest of airworthiness and safety.

D. Antitrust Division Role. Justice Department Comments filed on NPRM 77-19C are pursuant to authority given to it in what it cited in 1978 as 28 CFR § 0.40 (1976) which allowed it to intervene or participate "before administrative agencies functioning wholly or partly under regulatory statutes in administrative proceedings which require consideration of the antitrust laws or competitive policies." The rationale for such authority is that where a regulation may affect competition, the Justice Department may properly give the agency the benefit of its thoughts on possible competitive effect.

However, the Justice Department has here gone far beyond such authority. It not only opposes the rule making on erroneous economic theories, but, working hand in glove with its mentor, has launched a broad scale attack on the regulations without relation to competitive effect.

In so doing, the Justice Department repeatedly reveals its ignorance of FAA procedures. For example, one of the more blatant proposals it makes is to assess fees for FAA processing of type certificate applications. See p. 8, Justice Department Comments. Anyone with the least familiarity with the type certification process knows almost all type certification costs are borne by the applicant itself and the FAA's actual costs are comparatively little or nothing.

In other words, even though the Justice Department's assertions in respect to competition are erroneous (see E., below) they are at least made in a field in which it is supposedly knowledgeable and authorized to comment. But the Justice Department has gone far beyond commenting on competitive effect of the proposed regulation and has joined with Superior in a far-ranging attack on the contents and procedures of the regulation itself.

Where does the Justice Department get the expertise to comment on marking of aircraft replacement parts? Where does the Justice Department acquire the knowledge to comment on whether or not the FAA should allow testing of certain precision parts? For example, the Justice Department's citation of the L P Aero Plastics letter, see footnote, p. 5, Justice Department Comments, reveals it does not even know what a precision part is. Similarly, the FAA is scolded repeatedly by the Justice Department for not citing authority or mustering "proof" to support various aspects of its proposed rule making; yet the Justice Department feels free to indulge in lavishly erroneous economic theories without in any way supporting such inaccurate statements, see, e.g., fn., p. 6, Justice Department Comments.

The Justice Department has gone far beyond its authority by devoting the major portion of its Comments to an attack on the substantive or procedural aspects of the proposed regulations. It should properly have limited itself to comments on competition alone.

E. Anti-competitive Effect. In both Justice Department and Superior Comments are several assertions that the economic effect of the regulation will be anti-competitive. They claim adoption of NPRM 77-19C will have the effect of making it more expensive for PMA holders to enter the market and thus supposedly reduce competition.

We have previously commented extensively on this subject, see comments of Avco-Lycoming, in response to NPRM 77-19, Docket No. 17147, filed May 15, 1978. Briefly stated, the facts are:

(a) The FAA's primary mission is safety;

(b) Safety costs; it cannot be purchased at bargain rates. Like everything else of value in this world, it is not free;

(c) The research, development, design, testing and certification of aircraft parts costs money. These costs are borne entirely by the OEM's. PMA holders who obtain PMA's on the basis of "identicality" contribute nothing.

(d) It is economically unrealistic to think OEM's can continue to provide PMA's with a "free ride". It is even more unrealistic to advocate that the FAA must enforce such "free ride".

Indeed, both Justice Department and Superior concede this. The Justice Department complains, see p. 5, Justice Department Comments, of "the high cost of passing the testing requirement for new parts" which, it says, makes "identicality" the only feasible method for small concerns to obtain PMA's, even though such PMA holders "reap where they have not sown" and are thus unjustly enriched. Similarly, Superior complains, see p. 18, Superior Comments, that "Testing requires hundred of thousands of dollars and hundreds of man hours". This is in addition to the millions of dollars involved in research, development, design, testing and certification, borne solely by OEM's. What both the Justice Department and Superior propose is that PMA applicants on the basis of "identicality" should have the benefit of such expenditures by OEM's without contributing anything. "Identicality" involves improper acquisition of valuable information. We advocate abolition of "identicality". But if the FAA does not abrogate "identicality", it should certainly not make it any easier for PMA's to be so obtained, especially on the pretext of a supposed anti-competitive effect based on wholly erroneous economic theories.

Predictions are generally based on past experience. The predictions of monopolization here must be viewed in the light of the record in this industry. We detail in I.A., above, that three separate proceedings, by the Justice Department, by the FTC, and by Superior itself in a massive antitrust suit, have failed to show any indication of monopolization, either by Avco or others in the industry. Where do these predictions of anti-competitive effect come from?

F. Industrial Espionage. We have previously suggested the FAA consider removing the "identicality" method of obtaining PMA's. The almost ten-year history of "identicality" (not 25 years, as Superior indicates) shows it has encouraged industrial espionage and has resulted in at least five lawsuits involving improper methods of obtaining data. We have also cited the Justice Department's agreement with such statement and its concession that drawings on which PMA's obtained on "identicality" result from industrial espionage.

In its Comments, the Justice Department here tries to qualify its earlier statement and, surprisingly, misquotes its former brief, see fn., p. 4, Justice Department Comments. The record in this Docket shows the Justice Department, in its Comments of January 4, 1978, stated, at p. 12, "these drawings are generally obtained by industrial espionage."

Documents produced in recent litigation reveal drawings submitted by a PMA applicant were direct tracings of Avco-Lycoming drawings for the corresponding part. Depositions of draftsmen involved in production of drawings used as part of PMA requests established the applicant's drawings were developed by "direct tracing".

As we have previously argued, we are not urging the FAA to become a moral policeman. We do say, however, that logic and experience would indicate persons involved in industrial espionage will generally lack the integrity to properly inspect replacement parts made pursuant to the PMA they have obtained. This will become especially important if NPRM 77-19C's provision for issuance of a PMA on applicant certification alone is adopted.

III. CONCLUSION.

For the reasons and authorities cited above, we support adoption of NPRM 77-19C. For the many reasons stated, we also urge the FAA consider elimination of "identicality". For the good of the industry, we respectfully submit adoption of NPRM 77-19C be accomplished quickly.

Respectfully submitted,

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Mr. IRELAND. Thank you, Mr. Shapiro. I must say that to say that alluding to the Congress of the United States looking into something as being interference would raise the hackles of almost all Congressmen and I hope you don't really mean what you said there.

Mr. SHAPIRO. Mr. Chairman, I wouldn't want to do that.

Mr. IRELAND. Let me address right at the outset the safety issue because the charge of the FAA has to do with safety, and every regulation they put out starts with the boilerplate safety. It is very clear that nowhere in the FAA's record on this has safety been raised. That hasn't occurred. I would read into the record a quote from the Justice Department, "While the comments of the original equipment manufacturers, such as Pratt Whitney, Lycoming, Bendix, suggest that tighter quality controls are needed in this area, the record as developed to date, reveals no evidence that parts manufactured by any PMA holder have ever been recalled by the FAA for safety violations, a claim which few of the original equipment manufacturers can match." So, the FAA isn't pushing this for safety. Yet, you step forward and say we have a terrible safety problem and the FAA doesn't need a crash to go forward. The Justice Department looks at the record. It is of a great concern to me that this leads us to say that when you criticize the PMA manufactured part as being unsafe, you are, in effect, saying that the FAA's process is unsuitable and I would like to hear the justification. Where is the hue and cry? The FAA hasn't said it. You are saying, in effect, that the FAA's program is giving us unsafe parts and yet there is no history of unsafe parts when administered under this very law that they now want to change. It seems to be that you are pretty critical of the FAA.

Mr. SHAPIRO. I don't want to raise your hackles in any way.

Mr. IRELAND. Well, be kind enough to do it. It isn't hard.

Mr. SHAPIRO. The Justice Department's characterization of what the rulemaking is about is not necessarily correct. I think that when you have people who put out the type certificated engines, they have already spent the money. They put in all the money necessary to get these——

Mr. IRELAND. We are not talking about money. You brought up the matter of safety, which the FAA and no one else is talking about. We have a history of these parts never having had a problem. We are not talking about the cost to do it. The FAA's program of PMA's, whether done by identicality or what produces parts that are unsafe. Now, is that so? Do you believe that? Does your company believe it? I don't care how much it takes to build them.

Mr. SHAPIRO. I didn't say that they produced parts that are unsafe.

Mr. IRELAND. Well, you most certainly did.

Mr. SHAPIRO. What I did say is that the FAA is perfectly within its prerogative to go ahead and try to upgrade standards.

Mr. IRELAND. But the FAA—I beg to differ with you—has not said in any of their discussions about this rule that it is upgrading standards for safety's purposes.

Mr. SHAPIRO. I beg to disagree with the Chairman on that. I think the statements that I have footnoted or the reports that I have footnoted on page 2 in the initial footnote do.

Mr. IRELAND. We took due note of that. The FAA, and, of course, we will hear from them next week—the FAA in this rulemaking has never said the PMA program is producing unsafe parts. Isn't that correct? They are not doing that.

Mr. SHAPIRO. I don't know that one thing follows from another.

Mr. IRELAND. Well, it certainly does. You are telling us that this system that we have been using over this period of time produces unsafe parts. That is what you are telling us, right?

Mr. SHAPIRO. No, sir. I didn't——

Mr. IRELAND. Oh, then safety isn't an issue.

Mr. SHAPIRO. It is an issue——

Mr. IRELAND. If it is an issue, then they are producing unsafe parts.

Mr. SHAPIRO. What I have been trying to say is that it is well within the FAA's prerogative to try to upgrade safety standards and that you have a situation where people who do not originally develop, research, and put out the engine are making engine parts and it is well within their prerogative——

Mr. IRELAND. Well, now, wait a minute. Many of these parts are made by the same people. The original manufacturer is going out and getting vendors to make these parts, the same ones that the PMA's use correct?

Mr. SHAPIRO. That, like many of the statements this morning, was something of an overcharacterization. It certainly is not true.

Mr. IRELAND. Well, the record of our investigation shows that it is very true. We have some of the parts right here.

Mr. SHAPIRO. Well, I am not going to accept that statement because I don't believe it is right.

Mr. IRELAND. Some of these things are not furnished both to the——

Mr. SHAPIRO. Some of them are, but not in every instance the way you make it sound.

Mr. IRELAND. We will be talking further with the FAA about this safety factor, of course, but let me address your statement in here on the Regulatory Flexibility Act. This has been going on for 5 years. Of course, that is incorrect. This particular regulatory process began approximately January 15, 1981. The Regulatory Flexibility Act went in to effect on January 1, 1981, and I think that everybody involved should understand clearly it is a regulation dating from that and is not a regulation that is 5 years old which I think is important to note for the record.

Mr. SHAPIRO. I would again take exception to that statement, Mr. Chairman. I think the rulemaking started in 1977.

Mr. IRELAND. That is right, but those rules have long since been dropped and the rule that is under discussion right now began in January 1981.

Mr. SHAPIRO. It has many of the same things that the original 77-19 had and you will find if you go back into the record that Superior was just as strident against 77-19 as it is against 77-19C.

Mr. IRELAND. I am sure Lycoming was just as supportive.

Mr. SHAPIRO. I think that is a fair statement.

Mr. IRELAND. Let me ask you this: You mentioned that the burden on the FAA for the PMA program is real. Do you think that the FAA has a real burden along this line on identicality?

Mr. **Shapiro**. The FAA, as part of its regulatory evaluation, which again I have cited in a footnote on page 2, addresses that issue. I don't have the exact memory of what it said there, but it addresses that issue. I think they said that 77-19C will reduce the burden that they have.

Mr. **Ireland**. I am searching for your opinion as an expert in this area. In your opinion are they really burdened now and will this reduce it? Do you see how it would reduce it?

Mr. **Shapiro**. I don't pretend to be an expert on the FAA's administrative burdens.

Mr. **Ireland**. Well, again, I am just searching for——

Mr. **Shapiro**. I do think that they have taken that into account and they have made an assessment on it and that is what the Flexibility Act asked them to do and they have done it.

Mr. **Ireland**. A reference has been made that all these PMA's would have to put this revision number on, but no OEM's. Why wouldn't OEM's put that certification on?

Mr. **Shapiro**. I can see a difference between an OEM who originated the part that has all the original drawings on it and a PMA who is seeking to put it into air commerce on the basis of identicality. I can see the difference.

Mr. **Ireland**. I haven't heard anybody complain about the competition in relationship to this act. What they are talking about is the anticompetitive nature after the new rule. You addressed all your remarks to the competitive situation before this regulation goes into effect. The FAA has indicated that they think that after this goes in that there will be a lot more competition. Where is all of this competition going to come from?

Mr. **Shapiro**. I would support the view that there will be sufficient competition.

Mr. **Ireland**. No, not sufficient. They say there is going to be more.

Mr. **Shapiro**. I can't recall where you are taking that from, where they say it is going to be more.

Mr. **Ireland**. They don't say there is a need because of safety. They say there is a need for more competition. Where will that competition come from?

Mr. **Shapiro**. I hate to call you down, Mr. Chairman, but when you mentioned that in questioning previous witnesses, I searched my mind and I couldn't remember where——

Mr. **Ireland**. Whether you do or not, do you think this regulation will bring more competition?

Mr. **Shapiro**. I think it will maintain the same——

Mr. **Ireland**. I don't mean maintain, but will it bring more competition is my question?

Mr. **Shapiro**. I can't make that projection. I don't know.

Mr. **Ireland**. Will it create less competition?

Mr. **Shapiro**. No, I don't think it will do——

Mr. **Ireland**. You don't know whether it would be more competition?

Mr. **Shapiro**. I can't say that. I don't know. I can't make that projection, but I do say that it will not be less competition.

Mr. **Ireland**. In light of obsolete inventory, that sounds like less competition. Would you address that?

Mr. **Shapiro**. Yes. I don't know where you got that statement. I heard the witnesses saying that during their testimony, but I don't know where you got the statement. It grew to a couple hundred million dollars, as I understand.

Mr. **Ireland**. Call it 5 cents. Whatever inventory is out there is no longer useful, is that correct?

Mr. **Shapiro**. No, that is not true.

Mr. **Ireland**. Now, wait a minute. FAA doesn't approve them if they haven't got that extra number on there.

Mr. **Shapiro**. Not true. Not true. They were manufactured under valid PMA's and they can go right in just as they were before.

Mr. **Ireland**. Who knows when they were built? How are you going to tell?

Mr. **Shapiro**. Those parts were manufactured under valid PMA's. Whether or not the FAA enacts 77-19C has nothing to do with whether those parts can be introduced into air commerce. They were manufactured validly and they will go into air commerce and will be sold. I very much dispute the statements that were made previously and the basis of your questions as to whether or not those parts will be rendered useless.

Mr. **Ireland**. It sounds as if we have a good question for the FAA.

Let me ask Mr. Skelton for his questions at this point.

Mr. **Skelton**. Could you expand on your statement that identicality is not put out of reach to a PMA by this regulation?

Mr. **Shapiro**. Yes, they can still obtain the PMA's that they originally had. What they are complaining about is that they can't get the latest configuration or they claim they can't. I doubt that because they can easily do it, but they are claiming that they can't get the latest configuration, but there is nothing to prevent them from getting PMA's on the drawings that they have and on the information that they have.

Mr. **Skelton**. Did you ever recommend a stronger standard?

Mr. **Shapiro**. I sure did. In two comments that I submitted to the FAA I think in January 1978 and in September of last year, I did advocate that identicality ought to be done away with. Unfortunately, they didn't listen to me.

Mr. **Skelton**. Do you have any opinion on the future of technology research and technology development without this regulation?

Mr. **Shapiro**. Without this regulation?

Mr. **Skelton**. Yes.

Mr. **Shapiro**. I don't really know how to answer that. What you have here is a classic economic situation where you have certain people paying the costs and other people getting a free ride on the costs. That can't go on continuously. It just can't keep up. Somewhere along the line the people who are paying for it are going to have to have the costs shared. It is just an economic burden which they bear, which the PMA people who get it by identicality don't bear. I think you are trying to fool yourself if you think you are going to get it that way.

Mr. **Skelton**. You heard my questions concerning the situation of the Government contract prices, the commercial prices, and the PMA holder costs. Would that be industrywide or is that a specific instance there?

Mr. SHAPIRO. I have no knowledge of that, Mr. Skelton.

Mr. SKELTON. That does concern me and it should concern every taxpayer.

Mr. SHAPIRO. It concerns me and I am a taxpayer, but I have no knowledge of that area.

Mr. SKELTON. Thank you so much.

Mr. IRELAND. Mr. Shapiro, earlier in the testimony we had what we refer to as the George and Jerry letters. You were here and heard that testimony, the thrust of it being anyone but OEM's should not be making approved parts if they use subcontractors to make them. Do you differ with the review of what that letter said and its consequences? Is this all accurate?

Mr. SHAPIRO. Well, it is accurate that the letters were written. As I listened to it, I had a sense of deja vu because we had those a very prominent part of the lawsuit, those letters there, but certainly Superior never proved, never went into that there was something the matter with what——

Mr. IRELAND. No, I am asking you whether you think this is a proper way to operate, but people have alleged that this is strange to be doing it that way. Later, the FAA changed its mind. Do you have a reaction to that?

Mr. SHAPIRO. I have understood that everybody has access to the FAA and certainly I have correspondence in my briefcase here that Mr. Beckman has been actively peppering the FAA right now, seeking meetings, contacts with the FAA, writing letters. In fact, he wanted to have one contact and the FAA said, "No." It would be illegal. We are not going to have it. So, I don't think it is confined to just one person.

Mr. IRELAND. Oh, no, I am not asking that. What I am seeking your view is on this particular letter. The thrust of it was adopted by the FAA as the gospel and it took a lot of people a long time to get them dislodged from that. Did you think that it should have been the gospel or does the company that you represent think it should be the gospel?

Mr. SHAPIRO. I can't speak on behalf of myself or either one. I wasn't involved in any part of that. I only became involved after the lawsuit was filed in September 1976.

Mr. IRELAND. I wonder if you would comment on the fact that when your company asked the FAA to reopen the comment period, the request was approved. It sounds like something that would delay things and then when a PMA had the same request, he is denied the request. It would seem that maybe filibustering is great on the one hand when it is coming from your side of the street, but in your view, it is not when it comes from the other side of the street.

Mr. SHAPIRO. I think Docket 17147 will speak for itself and, sir, I would recommend that the staff go down, get you some photostats of the docket and we will count how many times Superior and its lawyers have been down there and how many times Avco-Lycoming has been down there in the 5-year period.

Mr. IRELAND. My point is that you are saying that anybody going down there is wrong.

Mr. SHAPIRO. I didn't say that.

Mr. IRELAND. Well, you indicate this is a great filibuster going on by the Congress even.

Mr. SHAPIRO. I am saying that this thing has gone on for 5 years and you are going to see, if you go down and you get that docket, you are going to see where all these requests for extension come and the more proceedings.

Mr. IRELAND. It may well be that it is probably a good thing that it has been going on because it looks like it needs to be looked at closely.

It was alleged earlier that an original equipment manufacturer was told by the FAA when its design was deficient but when a PMA goes in with their design and the FAA says its design is deficient, they won't tell them why. Can you comment on that? Is that a double standard?

Mr. SHAPIRO. Yes, I can comment on it.

Mr. IRELAND. Is it a double standard?

Mr. SHAPIRO. No, it is not a double standard at all because it is all based on proprietary rights. Unfortunately what you are saying is not true. It came out in the course of the lawsuit that Superior filed that that wasn't true what you are saying, but let's say it is true. It is based very much on the concept of proprietary rights, that if you have something, if you have paid lots and lots of money to research and develop, you have a certain right in those drawings and in that data. To reveal that to somebody else would be having the FAA participate in a misappropriation of those proprietary rights. That is the difference. That is the distinction in what you are saying. Unfortunately, that wasn't true in many instances.

Mr. IRELAND. You have commented on proprietary rights, industrial espionage activity which seems to appear to be a little bit like the safety issue. When you get right down to it, there doesn't seem to be much there despite the hue and cry about industrial espionage and such. Over the last 30 years there have been practically no suits where the OEM has jumped in and said, "You are stealing me blind." It is hard to reconcile this great hue and cry with the lack of activity on the part of the OEM's going to court.

Mr. SHAPIRO. Again, Mr. Chairman, this sounds like a broken record and I don't want to raise your hackles, but I have got to say that your information is wrong.

Mr. IRELAND. Have there been a whole lot of suits?

Mr. SHAPIRO. Yes.

Mr. IRELAND. Millions of suits?

Mr. SHAPIRO. No; five by my client alone. That is about all I can say.

Mr. IRELAND. In 30 years?

Mr. SHAPIRO. No; in the 10-year history of identicality, since about 1972 or 1973 when identicality went in.

Mr. IRELAND. What is the box score on that? I mean, what is it, five for five or one for five or——

Mr. SHAPIRO. No. I would say we are batting .800.

Mr. IRELAND. You lost one and you won four out of five?

Mr. SHAPIRO. Yes. Well, or else they were settled.

Mr. IRELAND. Well, now, which category do we put those in?

Mr. SHAPIRO. Winning, because our proprietary rights were upheld.

Mr. **Ireland**. So, you are saying four out of five?

Mr. **Shapiro**. Right.

Mr. **Ireland**. Mr. Skelton, do you have further comment or questions at this point?

Mr. **Skelton**. No, I think you took all my questions.

Mr. **Ireland**. I think we have one or two questions from the staff director.

Mr. **Lynch**. We were discussing earlier Avco-Lycoming versus Superior and statements made on the record. We will look at the record. I seem to recall the gentleman said that it was settled in a satisfactory manner, but let me quote from their testimony earlier and you can tell me if this is true or not:

> It [referring to Superior] obtains updates of designs of certain parts with applications in Lycoming engines from Lycoming pursuant to agreements reached settling the litigation between us in which Superior conceded for the purpose of the settlement certain proprietary rights of Lycoming.

Is that statement basically correct?

Mr. **Shapiro**. I guess the word "satisfactory" is basically a subjective thing and I don't know—if that is satisfactory to them, fine.

Mr. **Lynch**. But is that statement correct on the settlement? Is that what happened as part of the settlement?

Mr. **Shapiro**. It is correct in what it says. What it doesn't say is that the towel was completely thrown in on the antitrust charges and there was, by that arrangement such as you have quoted there, there was a complete recognition of Avco-Lycoming's proprietary rights in its drawings and data.

Mr. **Lynch**. Just a couple of other——

Mr. **Skelton**. Along that line, it was my impression that there was a substantial settlement. That is why I raised the issue.

Mr. **Shapiro**. If there was, it wasn't my client.

Mr. **Skelton**. It was an impression I got as opposed to the exact wordage used. That is where I got it. So, in essence, it was dismissed. They recognized the proprietary rights. Is that correct?

Mr. **Shapiro**. That was it.

Mr. **Skelton**. In your part of the suit. You don't know about the others, of course?

Mr. **Shapiro**. Well, I have got some idea, but I can't really—I don't have it in mind right now.

Mr. **Lynch**. In your statement you refer a couple of times to the economic advantage that the present system gives the PMA's. What part of the market do they control, would you say, percentagewise? We have heard testimony earlier that the OEM's control 80 percent of the market. Is that figure off base?

Mr. **Shapiro**. Mr. Lynch, I am not trying to be evasive, but that came in in the section 2 Sherman Act portion of the case and I just can't recall the figures on that.

Mr. **Lynch**. Would you say 80 percent is off base? Is that too high a figure?

Mr. **Shapiro**. Somewhat too high. I think Superior has made substantial inroads over the last 3 or 4 years and I am sure both Mr. Dedmon will be glad to affirm that. They have made some substantial inroads in their dollar volume of sales. It is hard to tell because of, I think—the recession has particularly hit the aircraft industry and I think that probably is a big factor.

Mr. LYNCH. We have had quite a debate on the question of how many PMA's are issued on identicality. Since we have been given the surveys sent out by the FAA, if the subcommittee were to go through all those surveys sent throughout the country on how many PMA's were requested, and how many were identicality, would that be a fair measure of what the percentage is, at least for that period of time, or would that be weighted the other way?

Mr. SHAPIRO. I don't know the answer to that. I just don't know the answer.

Mr. LYNCH. Thank you, Mr. Chairman.

Mr. IRELAND. Mr. Shapiro, I would like to discuss a little bit more on the Regulatory Flexibility Act which applies to this rule. The FAA in its great wisdom certified that it wasn't covered by the Regulatory Flexibility Act. On the one hand, they say that this is a very significant regulation, which would mean that regulatory flexibility would apply. Then on the other hand, they have indicated that it has no great significance. Can you comment. I mean, do you have an opinion about what the FAA——

Mr. SHAPIRO. I will comment on that. I think that the standard that the Flexibility Act requires, which is in 5 U.S.C. 603(a) says that the FAA must certify that there is no significant impact, economic impact, on substantial number of small entities. To me, that is a very specific thing. I don't know that whether the generic word "significant," I think is very—yes, it was significant in respect to the safety part of it.

Mr. IRELAND. They didn't say that, though. They say that it is insignificant.

Mr. SHAPIRO. I don't understand the Flexibility Act to require them to say that.

Mr. IRELAND. In order to certify they have to say that is not significant——

Mr. SHAPIRO. No, that is not what the act says. The act says that they have to certify that there is no substantial or significant economic impact on a number——

Mr. IRELAND. But if in truth we throw into obsolescence great inventories of parts held by small operators.

Mr. SHAPIRO. I have already stated that I disagree with that, too, that conclusion, too.

Mr. IRELAND. All right.

Mr. LYNCH. After the fact, when they proposed the rule, the FAA sent out this questionnaire to all the regional offices and stated in the letter sent to all the offices was that "the information that we are asking you to provide to us will be of great value in our evaluation effort of this proposed rule." Now, from your dealings with the Federal regulatory process, don't you find it interesting that they asked for that, received the information. They would not release it to the public and didn't even place it in the rulemaking record? How would one member of the public respond to what the administrative burden is going to be on the FAA: if the information is there, but they are not given the information. It would be a mere guess from anybody's standpoint, yet they had the information in hand.

Mr. SHAPIRO. Mr. Lynch, is that the 70,000 replies that was referred to by Mr. Beckman.

Mr. LYNCH. No, this was a letter that we are putting on our record. It is basically a letter to each FAA office asking how many applications do you get a year, how many people are assigned, how many man-hours and they received the answers. Yet they never even placed it in the record. Yet, I assume, from all I have heard from people I have talked to at the FAA, that one of their major arguments next week will be not only burdens on the PMA applicants and holders, but also the FAA itself. Yet, they put this information together and then didn't put it in the record. Don't you think that is out of the ordinary in the rulemaking proceeding? How does one comment?

Mr. SHAPIRO. I suppose it is. I really know nothing more about it than that. I certainly, however, and maybe I will throw this in and maybe I am speaking out of turn. I don't understand the thrust, except for maybe some of the witnesses. I don't understand the thrust of this hearing indicating that there is something wrong going on at the FAA, that somehow there is undercover work.

Mr. LYNCH. Well, the subcommittee is not saying that. The subcommittee is looking at how does an agency come up with a rule; then how do they enforce the law; do they allow the public a fair time to comment. To go back to the Regulatory Flexibility Act, once an agency certifies that it doesn't have a substantial impact on small business, that kicks out a major section of the Regulatory Flexibility Act, which makes the agency go out and try to find small businesses, by any means, even mailing letters, asking them do you think this regulation will affect you. That is what we are looking at. Why weren't these things done?

Mr. SHAPIRO. You are talking about section 609?

Mr. LYNCH. Yes.

Mr. SHAPIRO. I don't think you are focusing on what this industry is all about. What this industry does is if there is an engine, and I am not familiar enough with engines or anything mechanical to be able to identify, but let's just say there is the ABC engine. If the ABC engine is to be type certificated, there has to be a long process by the OEM whereby it is worked and tested. It is researched. It is developed and finally it is certified. That is a big cost. Now, they are going to have to try to recover that cost some place and the difference between the ball bearing that is marked from——

Mr. LYNCH. Manhan.

Mr. SHAPIRO. The Los Angeles gentleman's name. The difference between his ball bearing and the one that—the other one and I don't want to be put in the position of defending anybody—I have enough troubles with my own clients, but what I am saying is that the difference between one ball bearing and the other is that the other ball bearing from the original equipment manufacturer has built into it certain very substantial costs. That is the difference.

Mr. IRELAND. But it is the same ball bearing, coming from a subcontractor.

Mr. SHAPIRO. It may be the same ball bearing, but it costs to get that thing developed, researched, certified——

Mr. IRELAND. The OEM's build different airplanes and they get kind of tired apparently of generating parts for certain other aircraft or old models. So, they stop making them or, there is a lead time to get the parts—this is a tremendous economic impact, I would submit for your comment, on people that own those kind of aircraft. But if you really have to have it, you can get him to turn out a couple of them. You are at the mercy of him, for the cost and, for the time. Now, how do we address that problem?

Mr. SHAPIRO. You address the problem by the good old profit motive, which is that any manufacturer who can make some money selling a part is going to sell it.

Mr. IRELAND. But he can't get a PMA.

Mr. SHAPIRO. The manufacturer doesn't need the PMA.

Mr. IRELAND. That is what I am saying, but he isn't doing it. Yet a guy is stuck with a triple-wing plane out here or whatever.

Mr. SHAPIRO. He is going to do it because he wants to make money and you are overlooking the whole industry.

Mr. IRELAND. If he wanted to do it and make money, he wouldn't be discontinuing these things yet the PMA's are busy making parts for these things that an OEM doesn't want to fool with.

Mr. SHAPIRO. He is not discontinuing it and about all I can say without my going into a long economic discourse is we have covered the very subject you are talking about, Mr. Chairman, in the comments we filed in response to the Justice Department. There is a profit motive here, that they don't turn down business and if they can sell parts.

Mr. IRELAND. But that is destroyed by the fact that they don't manufacture those parts and somebody else does and sells a bundle of them. Now, they can do that right now, but they don't do it. Right?

Mr. SHAPIRO. No.

Mr. IRELAND. I mean, they clearly don't manufacture a whole lot of parts that other people are willing to buy and willing to make. I mean, that is part of the fabric of this whole thing. If there were such an economic desire to do it, they would step in and be doing it, but they don't.

Mr. SHAPIRO. What you are overlooking is the decided pressure that all of these engine manufacturers or engine OEM's are under from the airframe industry.

Mr. IRELAND. But that is their problem. You are trying to tell me they are competitive on the one hand and, then you are telling me they ought to have some special system because they are under some pressure. That doesn't fly.

Mr. SHAPIRO. No, I didn't say that. I said they are competitive because they are under pressure.

Mr. IRELAND. They don't seem to be too competitive if they won't go out and make some parts.

Mr. Skelton, do you have further questions?

Mr. SKELTON. No.

Mr. IRELAND. Anything else?

Mr. LYNCH. No.

Mr. TOPPING. Mr. Chairman, let me ask one question. Do you think that the views expressed by the other witnesses here this morning represent the FAA people satisfactorily or do you have evidence that some would agree with you in your assessment and FAA in its assessment.

Mr. SHAPIRO. I think that the views expressed this morning are the views expressed by those people who are expressing them and I don't think they are representative of a large section of the industry now. I think we heard Superior's view.

Mr. TOPPING. Do you know of others who would not agree to the views that were expressed this morning?

Mr. SHAPIRO. About the only thing I can do on that is refer you to the docket, where they put in the comments, but you also have to understand that there is kind of a silent majority—if I may use that phrase—there are a bunch of people who don't write in, don't make a habit of writing in. Also, I think you should understand that Superior circulated some letters to the entire industry soliciting comments. It really wasn't that successful, given the mailing list that they had. So, I think there was a silent majority that would not make Superior's view representative.

Mr. TOPPING. To what extent does the original manufacturer use small businesses in manufacturing their parts?

Mr. SHAPIRO. A great deal, a great deal, and I think I mentioned in my first paragraph that Avco-Lycoming has received a number of commendations and acknowledgments from the SBA for its support and outstanding performance in working with small business.

Mr. TOPPING. Thank you, Mr. Chairman.

Mr. IRELAND. Mr. Shapiro, I appreciate you letting us fire all of these slings and arrows at you. You are very kind and we appreciate it very much. Thank you so much.

Mr. SHAPIRO. Thank you.

Mr. IRELAND. Our final witness is from the Small Business Administration. He is the Director of the Office of Interagency Affairs, Mr. Charles Cadwell. Welcome. Sidling up beside him is Mr. Lawson. Gentlemen, thank you for being here and we will look forward to your comments.

TESTIMONY OF CHARLES A. CADWELL, DIRECTOR, AND GERALD LAWSON, COMPLIANCE OFFICER, OFFICE OF INTERAGENCY POLICY, OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. CADWELL. Thank you, Mr. Chairman. My name is Charles Cadwell and I am accompanied this morning by Gerald Lawson who is the professional who monitors the compliance of transportation and related agencies with the Regulatory Flexibility Act. I am pleased to be here to present the views of the Office of Advocacy and I should note that these views are not necessarily those of the administration.

Mr. IRELAND. Wait a minute. I didn't understand that. Now, whose views are these?

Mr. CADWELL. These are the views of the Chief Counsel of the Office of Advocacy.

Mr. IRELAND. They are not the views of whom?

Mr. CADWELL. They are not necessarily the views of the administration.

We have a prepared statement which I would ask to be included in the record.

Mr. IRELAND. Without objection.

Mr. CADWELL. Mr. Chairman, you have heard a fair amount this morning about the substance of the FAA's proposed rule. It may be helpful at this point to review the several purposes of the Regulatory Flexibility Act.

First of all, the act calls for agencies to inform the small business community of the anticipated impacts of proposed regulations. This, of course, presupposes the second purpose of the act, which is that agencies think about the impact, that they conduct some sort of analysis. Finally, it is the hope of the Regulatory Flexibility Act that agencies take steps to minimize or eliminate adverse impacts on small entities.

The key stage in the regulatory process for every agency is the decision to perform an analysis of small business impact or to certify that no significant economic impact is expected. The Department of Transportation and the Federal Aviation Administration are both among the more aggressive agencies in implementing the act. Last fall, in his appearance before this subcommittee, the chief counsel noted that the FAA's implementation was exemplary. Recently, the FAA has shared with us a draft of a proposed size standard, which differs from the SBA size standard. The proposal shows a welcome attention to the differential impact of FAA regulations on entities of differing sizes.

Thus, the instant case is an all the more notable exception. When this rule was proposed on January 15, 1981, the FAA chose not to conduct a Regulatory Flexibility analysis, but instead certified that the rule would not have a significant impact. Since that time and despite oral and written comments from our office and the comments of many affected small businesses and the Antitrust Division of the Department of Justice, the FAA apparently continues to insist that the rule will not have a significant impact.

As you have heard, the primary way this rule would hurt small firms is through its requirement that PMA applicants identify the type certificate holder's drawing revision designation in their application. In addition, the rule would require that the PMA produced part be marked with that same drawing revision designation.

Finally, the FAA proposes that certain unspecified precision parts may, at unspecified times and for unspecified reasons, be required to be tested in the same manner as type certificate parts, even though these parts are identical to the type certificate parts. The potential impact of these and other provisions is quite significant. Promulgation and enforcement of this rule would make it simply economically impossible for small independent parts manufacturers to continue in this line of business. That a substantial number of small firms would be affected is also clear.

While the size standard for aircraft replacement parts at the time this rule was promulgated was 1,000 employees, even when the standard is as low as 35 employees, fully 36 percent of all replacement parts manufacturers would be considered small.

This reasoning led us to conclude and to comment to the FAA that their certification of no impact of this rule was incorrect and that an initial Regulatory Flexibility Act analysis ought to be done. Given the long history of this proceeding and earlier comments of independent parts manufacturers, it is difficult to understand why the Agency has not conducted an analysis.

The essence of the Administrative Procedure Act, which the Regulatory Flexibility Act amends, is the provision of information by the regulator to the regulated on the effect and impact of proposed rules. This provides for the development of alternative regulatory schemes and more reasoned regulation. It is of much less utility to provide information to the public concurrent with the issuance of final rule, if at all. In the instant case, the FAA has deprived the public of the opportunity to review impact data in the possession of the Agency by failing to provide the data at the time of the proposed rule in the form of an initial Regulatory Flexibility Act analysis.

Thus, the third goal of the Regulatory Flexibility Act to produce tiered or flexible regulations has not been met in this case.

In summary, while the FAA has generally done a fine job implementing the Regulatory Flexibility Act, in this proceeding the Agency has continued to insist, against broad evidence to the contrary, that the Regulatory Flexibility Act does not apply because no small entities will be significantly affected. Our opinion is that the FAA is wrong and that the rule should be reissued with at least an initial Regulatory Flexibility Act analysis.

More productively, the FAA should examine new and less burdensome provisions to achieve the Agency's legitimate safety mission.

That concludes my remarks and I would be happy to answer any questions the committee may have.

[Mr. Cadwell's prepared statement follows:]

PREPARED STATEMENT OF CHARLES A. CADWELL, DIRECTOR, OFFICE OF INTERAGENCY POLICY, OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION

As the representative of the Chief Counsel for Advocacy of the U.S. Small Business Administration, I wish to thank you for the invitation and opportunity to provide the views of the Office of Advocacy on the implementation of the Regulatory Flexibility Act (RFA) by the Federal Aviation Administration (FAA).

As you are aware, specific legislation, Public Law 96-354, directs the Chief Counsel for Advocacy to monitor agency compliance with RFA. Additionally, Public Law 94-305, 15 U.S.C. 634(c), directs the Chief Counsel to represent the views and interests of small businesses where actions, regulations, or decisions of Federal agencies adversely affect them.

The Department of Transportation, (DOT) and its constituent agency, the FAA, have made laudable and effective efforts toward full implementation of the RFA. The Chief Counsel for Advocacy has testified before this Subcommittee previously that DOT's implementation of the Act has been exemplary. The staffs of DOT and its subordinate agencies have worked cooperatively and well with the staff of the Office of Advocacy to solve RFA implementation problems as they develop. These problems have been resolved to the satisfaction of all parties, to the best of my knowledge, except for one. That unresolved problem is the issue which brings us here today.

On January 15, 1981, FAA published a proposal to modify its rule on Parts Manufacturer Approvals (PMA). This proposed rule was certified under the Regulatory Flexibility Act as having less than significant impact upon a substantial number of small entities. The reason provided for the "certification" is that the proposed changes would relieve the administrative burdens currently encountered by PMA applicants. Specifically, the FAA certified that:

"It has been determined that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As explained in Section II A, Benefits, of The Draft Regulatory Evaluation, the changes proposed in this notice would relieve the administrative burden currently encountered by applicants for Parts Manufacturer Approvals. Relief is provided by allowing the applicant to make a certifying statement that the design submitted for approval is identical to specifically identifiable version of a part covered by a type certificate and by eliminating the requirement for submission of type certificated data showing identicality."

The Office of Advocacy found the "certification" of this rule inappropriate because it would effectively reduce the participation of independent and small manufacturers in the Parts Manufacturer Approval process in an industry having a high concentration of small businesses. We communicated our concerns to the FAA both orally and in writing (copies attached), and are aware that representatives of the affected industry also informed the FAA of the potential impact of the proposal and of its failure to prepare a regulatory flexibility analysis. We recommended to the FAA that it reconsider its "certification" and publish an initial regulatory flexibility analysis as required by 5 U.S.C. 603.

The FAA has failed to withdraw its "certification" and continues to insist that the rule will not have a significant economic impact while maintaining that opponents of this rule are misinterpreting FAA's intent.

The proposed rule, in contrast to what the FAA maintains, does not reduce PMA applicants' administrative burdens but rather imposes dramatic administrative and economic burdens on small PMA applicants and holders without any apparent safety justification.

The primary way this rule would hurt small firms is through its requirement that PMA applicants identify the type certificate holder's drawing revision designation in their applications. First, the type certificate [1] holder's drawings and revisions, including the revision designations, are generally unavailable to small parts manufacturers. Second, the revision designation is irrelevant in any case. Identicality of the PMA produced part to the type certificate holder's part is based upon form, fit and function of the part, not on a drawing revision designation.

In addition, the proposed rule would also require that the PMA produced part be marked with the type certificate holder's drawing revision designation. To reiterate, the type certificate holder's drawing revision designation is unavailable to small manufacturers. A PMA produced part is marked with the PMA manufacturer's identification and part number. This should satisfy both replacement and safety concerns since the part has previously been judged identical to a given type certificate holder's part when the FAA issued the PMA for the part.

The FAA also proposes that certain unspecified "precision parts" may, at unspecified times and for unspecified reasons, be required to be tested in the same manner as type certificate parts are tested, even though these parts are identical to the type certificate parts. This would affect all PMA applicants since virtually all parts requiring issuance of a PMA prior to production are "precision parts." Gaskets and like items do not require PMAs. The FAA has not provided the slightest information in its proposal as to which parts may require testing, the criteria for selecting parts for testing, the tests to be required or the safety justification for the proposed requirement. Testing of the type contemplated is extremely expensive. The uncertainty as to a given part being selected for testing would have a chilling effect on PMA applications, and particularly on smaller applicants who cannot afford this degree of economic uncertainty.

The potential impact of these and other provisions of the rule is quite significant. Promulgation and enforcement of the rule as proposed would make it economically impossible for small, independent parts manufacturers to continue in this line of business. Accordingly, a regulatory flexibility analysis including alternative regulatory schemes, should have been prepared.

The Regulatory Flexibility Act contemplates that an agency consider two criteria in preparing a proposed rule: (1) will the rules economic impact be significant and (2) will this significant impact affect a substantial number of small entities? There is little doubt that both criteria are met in this case.

Under current Small Business Administration size standards, a business with 1,000 or fewer employees in the aircraft replacement parts industry (SIC 3728) would be considered small. The FAA, since it did not at the time of this rulemaking propose a different standard, is presumed to have adopted the SBA size standard in this rulemaking. Under this standard, there can be little doubt that a majority of the PMA manufacturers would be considered small businesses for Regulatory Flexibility Act purposes, since the majority of the businesses in this industry employ fewer than 1,000 persons. Interestingly, the FAA is currently proposing a much lower size standard for regulatory purposes. They propose that in the aircraft replacement parts industry, a business employing 35 or fewer employees would be considered small. Even at this lower standard, over one-third of the industry would still be considered as small.

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[1] An approval by the FAA to manufacture aircraft and aircraft engines of a specific make and model, including those aircraft and engines which are similar in design.

The FAA has also proposed in the same document a set of guidelines which establish threshold levels for determining "significant economic impact." The level identified for the aircraft replacement parts industry is $9,000.00 of net annualized regulatory costs per company (in December 1981 dollars) for more than a third of the industry. It can readily be determined without extensive analysis that the provisions of this parts manufacturer approval rule will occasion regulatory costs far in excess of the designated threshold level for those small businesses seeking to obtain or retain PMAs.

Our analysis of this rulemaking, buttressed by reinforcing statements from members of the affected industry, lead us to the conclusion, as expressed in our March 3, 1982 comments to the FAA, "that FAA's attempt at certification of this rule under § 605(b) is erroneous." Nothing has happened since that time to change our belief.

An important additional effect of the "certification" decision is that Section 609 of the Regulatory Flexibility Act which calls for increased small entity participation in rulemaking is not triggered. Therefore, a "certification" of a proposed rule not only relieves the promulgating agency from preparing a regulatory flexibility analysis, but also relieves it from the requirement of taking affirmative actions to involve small entities in the rulemaking before the agency is committed to a rule in final form.

The essence of the Administrative Procedure Act, which the Regulatory Flexibility Act amends, is the provision of information by the regulator to the regulated on the impact of newly conceived regulations before they take effect, so that alternative regulator schemes may be proposed and evaluated. It is of slight utility to provide this information to the public, concurrent with the issuance of the final rule.

In the instant case the FAA has foreclosed the public's opportunity to review economic impact data in the possession of the agency by failing to provide such data in the form of an initial regulatory flexibility analysis. The public's ability to comment or to suggest alternative regulatory schemes is to a large degree disabled by the lack of access to this data.

In summary, while I have not addressed the substantive merits of the proposed rule at length since we have prepared extensive comments to the FAA, the Office of Advocacy continues to maintain that the proposed rule is one having a high and disproportionate economic impact upon small businesses. In our opinion the proposed rule increases, not lessens, the administrative burdens upon PMA applicants and holders; erects unnecessary and unreasonable barriers to entry and participation in the market place; places the small independent manufacturers at a competitive disadvantage; and encourages industry concentration and market dominance by large type certificate holders. Because of the magnitude of these economic impacts on an industry segment composed primarily of small businesses, it is the judgment of the Chief Counsel for Advocacy a judgment which has been communicated to the FAA previously, that the FAA's certification of this proposed rule is improper.

Thank you for the opportunity to testify on this matter. I am hopeful that the information developed during this hearing will improve future implementation of the Regulatory Flexibility Act for all involved parties. I will be happy to answer any questions which you may have.

(Attachment 1)

NOVEMBER 4, 1981.

Re rules Docket (ACC-204) Docket No. 17147.

FEDERAL AVIATION ADMINISTRATION,
Office of the Chief Counsel, Washington, D.C.

GENTLEMEN: The Office of Advocacy, within the U.S. Small Business Administration, is charged by Regulatory Flexibility Act (RFA) 5 U.S.C. section 601 *et seq.* with monitoring agency compliance with the Act. We have reviewed your agency's certification that the proposed rule "Parts Manufacturer Approvals; Falsification of Airworthiness Certification Documents" issued January 15, 1961 (46 F.R. 3776) will not have a significant impact on a substantial number of small entities. The reasons supporting the certification state:

"As explained in Section II A, Benefits of the Pratt Regulatory Evaluation, the changes proposed in this notice would relieve the administrative burden currently encountered by applicants for Parts Manufacturer Approvals. Relief is provided by allowing the applicant to make a certifying statement that the design submitted for approval is identical to a specifically identifiable version of a part covered by a type certificate and by eliminating the requirement for submission of type certificated data showing identicality."

While we commend the FAA on its efforts to comply with the RFA, we question the rationale behind this certification. This Office has recently been made aware of a number of small entities who seriously question the appropriateness of the certification. These entities, independent part manufacturers, indicate their belief that the proposed rule may serve to eliminate participation by small parts manufacturers in the aircraft replacement parts market and increase the costs for aircraft repair.

Without expressing any comment on the substance of the proposed rule at this time, we urge the Administration to take cognizance of the perceptions of these small entities and consider the preparation and publication of an initial regulatory flexibility analysis which meets the requirements of Section 603 of the RFA. While this might necessitate republication of the proposed rule, we believe that an initial regulatory flexibility analysis is warranted given the apprehension of severe economic impact expressed by various small entities upon whom this proposal impacts.

If my office can be of assistance to you in assessing the small business impact of this or any other proposed rule, please feel free to contact us.

Sincerely,

FRANK S. SWAIN,
Chief Counsel for Advocacy.

Attachment 2

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Notice 77-19C)
Parts Manufacturer Approvals:)
Falsification of Airworthiness)
Certification Documents)

Docket No. 17147

PETITION TO FILE COMMENTS

Frank S. Swain
Chief Counsel for Advocacy

Charles A. Cadwell
Director
Office of Interagency Policy

Doreen E. Thompson
Director
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Gerald T. Lawson
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U.S. Small Business Administration
1441 L Street, N.W.
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March 3, 1982

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Notice 77-19C)
Parts Manufacturer Approvals:) Docket No. 17147
Falsification of Airworthiness)
Certification Documents)

PETITION FOR ADDITIONAL RULEMAKING

Pursuant to Section 11.33 of the Federal Aviation Administration (FAA) Rules of Practice, which provides for additional rulemaking proceedings which best serve the purposes of a particular proceeding, the Office of the Chief Counsel for Advocacy, (hereinafter, Office of Advocacy") within the U.S. Small Business Administration, respectfully requests that the Administrator consider the relevance of the attached comments to the above-titled rulemaking.

First, these comments should assist the FAA in complying with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq*. which is applicable in this proceeding, and which provides in certain instances that noncompliance will result in the lapsing of any final rule. Section 612 of the RFA specifically directs the Chief Counsel for Advocacy to monitor agency compliance. In this role, the Office of Advocacy is particularly suited to provide guidance to agencies in their compliance activities.

Second, these comments present the small business view in a proceeding which is of substantial interest to the small business community. The Office of Advocacy was created by Public Law 94-305* and empowered to represent small business interests and communicate their views to other Federal agencies. This generic statute requires the Office to:

1. serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of the Administration and any other Federal agency which affects small businesses;

2. develop proposals for changes in the policies and activities of any agency of the Federal government which will better fulfill the purposes of the Small Business Act and communicate such proposals to the appropriate Federal agencies;

3. represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business.

Respectfully submitted,

Frank S. Swain
Chief Counsel for Advocacy

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*Title II, Small Business Act and Small Business Investment Act Amendments of 1976, 15 U.S.C. 634a et seq.

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Notice 77-19C)
Parts Manufacturer Approval:) Docket No. 17147
Falsification of Airworthiness)
Certification Documents)

COMMENTS OF THE OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY.
U.S. SMALL BUSINESS ADMINISTRATION

Pursuant to authority granted by Title II, Small Business Act and Small Business Investment Act Amendments of 1976 (15 U.S.C. 634a et seq.) and the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Office of the Chief Counsel for Advocacy, (hereinafter "Office of Advocacy") within the U.S. Small Business Administration, submits the following comments on the Notice of Proposed Rulemaking by the Federal Aviation Administration (FAA) entitled "Parts Manufacturers Approvals: Falsification of Airworthiness Certification Documents." [Notice 77-19C, 46 FR 3776 (January 15, 1981)]

In 1977, FAA issued Notice 77-19 (42 FR 43985: September 1, 1977), proposing to: (1) revise the appplication and reporting requirements applicable to Parts Manufacturers Approval (PMA) and (2) clarify the means by which an applicant for PMA can show the design of applicant's part is identical to the design of part that is covered under a type certificate. 1/ The proposal also sought to update certain number references and to address the issuance of export certificates of airworthiness. The latter issues were adopted by amendment 21-48 issued March 15, 1979.

As to the proposals concerning PMAs, the FAA has indicated that the proposed rule is an effort to clarify and strengthen the agency's enforcement policy, improve safety and eliminate unnecessary procedural burdens to both the PMA applicant and FAA personnel. The FAA certified that the proposal would not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA).

These comments express our concerns that the proposal will adversely and disproportionately impact those small businesses engaged in the independent manufacture of replacement parts for aircraft systems under authority granted by the FAA. Our assessment of the proposal indicates that it will impose

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1/ An approval by the FAA to manufacture aircraft and aircraft engines of a specific make and model, including those aircraft and engines which are similar in design.

additional administrative burdens, erect unreasonable barriers to entry, place small businesses at a competitive disadvantage and encourage industry dislocation and concentration. Specifically, the Office of Advocacy maintains that:

1. The FAA has failed to provide adequate justification for requiring in Section 21.302 of the proposal that PMA applicants identify the type certificate holder's drawing revision designation: 2/

2. The FAA has failed to provide adequate justification for requiring in Section 45.15 of the proposal that PMA produced parts be marked with the type certificate holder's drawing revision designation;

3. The FAA has failed to provide adequate justification for proposing the discretionary testing of precision parts as provided in Section 21. 302 of the proposal;

4. Proposed Section 21.2(b) regarding fraudulent or intentionally false statements is vague and lacking in specificity; and

5. Since the proposal has significant and disproportionate economic impact on small business, a regulatory flexibility analysis should be prepared as required by the RFA.

2/ The drawing revision designation refers to a change in the alphanumerical designation by which the type certificate holder identifies a specific part.

I. BACKGROUND

Following the end of the second world war, as the supply of aviation replacement parts produced during the war was exhausted and type certificate holders failed to produce sufficient replacement parts to meet demand, bogus replacement parts came into the market. Bogus parts were those parts produced by independent manufacturers without Civil Aeronautics Administration (CAA) approval and falsely marked as being type certificate holders' parts. To address this problem, in 1956 the CAA established the Parts Manufacturer Approval (PMA) system.

Under the PMA system an independent manufacturer submits a design for a replacement part to the FAA. The FAA checks the design to determine if it will produce a part equivalent in form, fit and function to the type certificate holder's part. Additionally, the independent manufacturer must establish to the FAA's satisfaction that it has a fabrication inspection system which assures quality control. If the design is adjudged to be identical and the fabrication inspection system is satisfactory, the FAA issues a PMA and the independent manufacturer produces and sells replacement parts under the PMA authority. These parts are marked with the PMA holder's name and part number so that should problems develop they may be traced to the source. In fact, few problems have arisen during the 25 year duration of this system.

Many of the independent manufacturers holding PMA authority are small businesses. Their entry into the market has provided an alternative source of replacement parts to aircraft owners, operators, repair stations and mechanics, thereby creating competition in an industry previously limited to type certificate holders. By creating a market counterbalance these independent manufacturers have forestalled industry concentration and consequent undue price enhancement.

II. DISCUSSION

A. The FAA has Failed to Provide Adequate Justification for Requiring that PMA Applicants Identify the Type Certificate Holder's Drawing Revision Designation

Currently, a PMA applicant need only demonstrate to the FAA that its design will produce a part identical to that of the type certificate holder and that its fabrication inspection system is adequate to assure quality control. Sections 21.302(a)(1) and 21.302(a)(3)(i) of the proposal would impose the additional requirement that a PMA application identify the type certificate holder's drawing revision designation to which the PMA design is identical.

First, there is no need for a PMA applicant to provide the FAA with the type certificate holder's drawing revision designation. This designation is irrelevant to the FAA's approval of a PMA design, which claims identicality only to a part to which the type certificate holder has assigned a certain part number.

Subsequent to assigning a number to an aircraft part, the type certificate holder might make numerous changes in the data related to the part drawing, including the drawing revision designation. The reasons for these changes can include, changes in the corporate name, in the suppliers of material used in the part, or even in the filing system in which the drawing is maintained.

It should be clearly understood by the FAA that the drawing revision designation has primary relevance to the type certificate holder's drawing, secondary relevance to the type certificate holder's part produced as a result of the drawing, and no relevance to the PMA produced part which is a reflection of the PMA Manufacturer's drawing upon which the claim of identicality to the type certificate holder's part is made. Stated simply, PMA applicants claim identicality to a part produced by a type certificate holder, not to a type certificate holder's drawing which, in most cases, they have never seen.

Second, this additional requirement adds nothing to safety assurance. In the PMA application process, applicants provide the FAA with parts designs which will produce a part equivalent to the type certificate holder's part. This production equivalence results in parts which function at least as safely and efficiently as the type certificate holder's part.

Under the current system a replacement part, manufactured by either a type certificate holder or a PMA holder, which is found to create an air safety hazard will be modified or replaced. The hazard will be identified as a result of operational experience or from air crash analysis. Should the hazard result from a design failure of the type certificate holder's part to which a PMA part is identical, notice of the hazard, and any change to the part required, would be given to the public including the PMA holder by type certificate holder service order, by FAA issued airworthiness directive, or both. The type certificate holder's remedying design change in this case is relevant to the PMA manufacturer, the type certificate holder's drawing revision designation is not.

Lastly, the proposal increases rather than reduces the administrative burdens faced by the PMA applicant. Drawings and data related to drawings are proprietary to the type certificate holder. To require the PMA applicant to obtain this proprietary data, creates an unreasonable and unnecessary impediment to independent manufacturer participation in the replacement parts market.

B. The FAA has Failed to Provide Adequate Justification for Requiring that PMA Produced Parts be Marked with a Type Certificate Holder's Drawing Revision Designation

Under the current system, PMA parts are marked with the PMA holder's name or mark and part number. At section 45.15(a)(5) of the proposal, the FAA proposes to require that a PMA holder's parts be additionally marked with the drawing revision designation of the type certificate holder's part drawing to which the PMA part is equivalent. The FAA's justification for proposing this additional requirement is that it is needed "to properly assign responsibility for correcting any service or airworthiness problem."

This justification appears to be baseless. First, the FAA has not indicated that it cannot now adequately fix responsibility or how this requirement adds to safety related assurance beyond what is currently provided by the PMA system. Second, assuming that this requirement does add to safety assurance, the FAA does not make clear why the additional requirement is placed on PMA applicants only and is not also required of type certificate holders.

Requiring that type certificate holder's drawing revision designation be marked on parts produced by independent manufacturers is without logical foundation. As previously discussed, parts revision information does not necessarily reflect safety related changes. In addition, drawing revision designations do not indicate who is responsible for correcting any service or airworthiness problem. It is therefore unclear how this requirement will add to safety assurance.

The proposed requirement is also unfair to PMA holders since the type certificate holder is not required to provide this information on its own replacement parts, and in practice does not mark its parts with drawing revision designations. This requirement would therefore increase the burdens on PMA applicants since the type certificate holder's drawing revision designation is unavailable to the independent manufacturer. Moreover, since the provision would apply to all previously granted PMAs, parts manufactured under those PMAs could not be marked with the type certificate holder's drawing revision designation and consequently could not be sold. This could result in the virtual elimination of small business from the replacement parts market.

C. The FAA has Failed to Provide Adequate Justification for Proposing the Discretionary Testing of Precision Parts

Section 21.301(b) of the proposal provides that the Administrator of the FAA "may require" that an applicant who has provided certification under proposed Section 21.302 demonstrate the acceptability of "certain precision parts" by conducting endurance or environmental testing or both, equivalent to the FAA testing requirements applicable to the product on which the part is to be installed. The justification provided by the FAA for this requirement is "that certain kinds of high-precision parts, manufactured to identical design data but by different manufacturers or suppliers, perform differently due to subtle differences in production processes."

The FAA's justification is silent as to what affect any differences in parts performance have had on safety, and provides no supporting data based on scientific testing to validate this perceived need for testing. In addition, the proposal fails to specify the parts which may require testing or the criteria under which PMA applicants will be selected for testing.

This discretionary requirement creates an additional impediment to small business participation in the replacement parts market. First, since virtually all aircraft parts (with the exception of gaskets and like items, which do not require PMAs in any case) are precision parts, and the proposal does not indicate on which parts testing will be required, PMA applicants face a broad anticipatory burden. Second, this burden is exacerbated by the provision's failure to specify the criteria under which PMA applications will be selected. Testing of the contemplated sort can cost the PMA applicant in excess of $100,000 per part. This would, in most cases, render the PMA application uneconomical thereby eliminating small independent manufacturers from the replacement parts market.

D. The Proposed Section on Fraudulent or Intentionally False Statements is Vague and Lacks Specificity

Section 21.2(b) of the proposal provides that any falsification of applications, reports or records, constitutes grounds for suspending or revoking all FAA certificates and approvals issued to persons involved in the violation.

This penalty is vague and lacks sufficient correlation to the safety goals of the regulatory scheme. An innocent alteration or mistake on any one of several forms could involve the PMA holder or applicant in lengthy and expensive legal proceedings where the manufacturer's intent would be the issue. Without distinguishing between safety-related data or information and less critical material, the proposed rule exposes manufacturers to possible loss of all licenses, or at the least the necessity of defending themselves in a hearing.

If the provision were narrowed to safety-related information, the severity of the penalties would be less unreasonable. While we do not condone any knowing falsification of information, and believe that all manufacturers have an obligation to assure the accuracy of materials submitted to the FAA, the provision proposed is far broader than necessary to achieve the result desired.

D. Analysis of the Proposal Reveals Significant Impact on a Substantial Number of Small Entities, Therefore A Regulatory Flexibility Analysis Under the RFA is Required

The Regulatory Flexibility Act requires that Federal agencies which propose rules prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. 3/ The RFA further requires that this analysis, or a summary, be published in the Federal Register at the time of publication of the proposed rule. A copy of the full analysis must be submitted to the Chief Counsel for Advocacy of the Small Business Administration, who is authorized to monitor agency compliance with the RFA. This analysis gives notice to small entities of the body of information in the agency's possession and an indication of alternative regulatory strategies which the agency has considered. A well-prepared IRFA focuses the public's attention on the issues known to the proposing agency and provides the agency with a better opportunity to gather and analyze information received from the public on the proposal's economic impact and alternative methods of achieving the agency's regulatory goal.

The RFA also provides that should the head of a agency proposing a rule certify that the rule, if promulgated will not have a significant economic impact on a substantial number of

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3/ 5 U.S.C. 603.

small entities, the agency may be relieved of preparing an initial or final regulatory flexibility analysis. This certification must be accompanied by a succinct statement explaining the reasons for such certification. 4/ The FAA in the instant case stated, at 46 FR 3780: "It has been determined that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities."

It is the opinion of the Chief Counsel for Advocacy that the FAA's attempt at certification of this rule under §605(b) is erroneous. We believe that the proposed rule should not have been certified but should have been accompanied by an initial regulatory flexibility analysis. First, the FAA should have been aware, that the entities affected by their proposed modification of the PMA program - PMA manufacturers, aircraft owners and operators, repair stations and mechanics - are overwhelmingly small businesses. Second, the FAA should have been aware of the underlying issues, their relevance to economic survival in this industry, and the resulting significant impact on the small and independent participants in the industry.

4/ 5 USC 605(b).

The essence of the Regulatory Flexibility Act, in its direction to Federal regulatory agencies, is that the agency take cognizance of the impact of its regulations on the economic well-being of small entities. The proposal under consideration does not indicate that the agency has considered alternative, less economically disabling methods of achieving its regulatory goal. Therefore, in the judgment of the Chief Counsel for Advocacy, the FAA's attempt at certification of this rule under the RFA is improper and the proposal should be withdrawn and republished with an initial regulatory flexibility analysis as required by the RFA.

III. CONCLUSION

The proposed rules, applying as they do only to the PMA system, primarily impact upon small business. They increase, not lessen, the administrative burden of PMA applicants and holders, erect unnecessary and unreasonable barriers to entry and participation in the marketplace, place the small independent manufacturers at a competitive disadvantage, and encourage industry concentration and market dominance by the large type certificate holders.

It would appear that little will be gained by the proposed changes to the PMA system with the exception of a lowered competitive risk to type certificate holders in their sales of replacement parts. If there are compelling safety reasons for modifying the PMA system, they are not apparent in the FAA's proposal. Further, even if there should be safety reasons for the proposed changes to the system, or if these changes could lessen the administrative burdens on FAA personnel, these benefits should clearly outweigh tampering with the economic stability and competitiveness of this industry. We believe this has not been the case.

There is a real apprehension in the affected industry and in industries which utilize PMA parts that the proposed rule could eliminate PMA manufacturers from the market and that such an elimination would cause the reappearance of bogus parts. Should this occur, it would not only increase FAA's enforcement burdens, but would also compromise air safety. The FAA might better serve by encouraging the participation in rulemaking of all sectors of the industry. We recommend that further alternatives be explored for the purpose of regulating safety and reducing administrative costs without inflicting potentially damaging economic burdens on small and independent members of the industry.

Respectfully submitted,

Frank S. Swain
Chief Counsel for Advocacy

March 3, 1982

Mr. **Ireland**. Mr. Cadwell, would you address the interview what the FAA has said about this in regard to safety?

Mr. **Cadwell**. Mr. Chairman, when we review regulatory proposals from our monitoring perspective, we deal with the same documents that the public deals with, proposed rule that appears in the Federal Register and the accompanying analyses. As you have noted, there is not much safety justification we can find in that proposed rule.

Mr. **Ireland**. When an agency such as FAA certifies there is no significant impact, that triggers a number of activities. When they certify that, tell us what happens.

Mr. **Cadwell**. When an agency certifies no impact of a proposed rule, that certification is required to appear in the Federal Register with the notice of proposed rulemaking. At the agency, unless they decide to do something differently, that usually ends their analysis of small business impact and relieves the agency of the burdens of section 609 which requires affirmative steps to involve the small business community.

In our office those certifications are generally received and reviewed by a staff professional, who looks at the certification to see whether it, first of all, makes sense and, second of all, whether it is supported by a succinct statement explaining the certification as required by section 605(b).

In this case, we have filed two separate written comments with the FAA and we have had numerous oral contacts. I don't think there has been any further formal action taken on this rule by the FAA since this January 15 notice of proposed rulemaking, other than to extend the comment period.

Mr. **Ireland**. So, they really——

Mr. **Cadwell**. We have not heard back from them on our suggestion that they conduct an initial regulatory——

Mr. **Ireland**. When did you make that suggestion?

Mr. **Cadwell**. I believe it was on March 3, 1982.

Mr. **Ireland**. So, you haven't heard back from them since March?

Mr. **Cadwell**. Mr. Lawson has had informal contact with FAA staff, but formally, no, we have not heard back.

Mr. **Ireland**. Let's see. That is March, April, May, June, July, heading for August. They must be burdened. Mr. Lawson, could you tell us about some of those informal contacts for the record?

Mr. **Lawson**. Generally speaking, we deal with the regulatory flexibility officer, who in the case of the Department of Transportation is in the General Counsel's Office of the Department of Transportation. In this case, after discussing it with the Assistant General Counsel for Regulation we talked with people from the Chief Counsel's Office of the FAA, as well as people from their Office of Airworthiness, who had issued this regulation and apprised them of our concern based upon the lack of a supporting statement for the certification, as well as our analysis of the substantive effects of the proposed rule itself.

In contrast to our previous contacts with the Department of Transportation, which as Mr. Cadwell has previously testified have been very good in terms of their exemplary implementation of the Regulatory Flexibility Act, in this case I am going to paraphrase we were told that we didn't understand their intent essentially, "trust us."

My problem with that as the professional monitoring the FAA is that if I or anyone else in the general public have a difficulty discerning their intent from their published notice of proposed rulemaking, then there is something deficient in the notice because we should be able to discern from their published analysis what they intend. We should not have to crystal ball it, if you will.

Mr. IRELAND. When they certify that this isn't going to impact small business they are supposed to have a supporting statement, right? What we are saying is that they had no support—they haven't come across with a supporting statement to back up that certification.

Mr. LAWSON. Their reason for the certification as published in the notice of proposed rulemaking referred to a regulatory evaluation. We subsequently received a copy of that regulatory evaluation and, as a matter of fact, I think you have a copy of it also. There is what I consider to be a lack, a decided lack, of backup to that regulatory evaluation. It simply says that the economic impact is negligible and further impacts are none or negligible. I don't know who or how that statement was developed and I submit that the public certainly doesn't either.

Mr. IRELAND. Well, I think that we would be well advised to ask the FAA how it was developed.

In this evaluation we have heard some conflicting testimony concerning the obsolescence of inventory if the rule should go through. Can you gentlemen shed some light on that?

Mr. LAWSON. One of the sections of the proposed rule requires that all PMA produced parts be marked with the original equipment manufacturer's part number, including the revision designation. Those parts which are inventoried today do not have that revision designation marked on them, simply because it was never required before. If the rule goes into effect, then any part in inventory anywhere, which does not have the revision designation on it and none of the PMA parts will, will be unusable under FAA regulations. Now, perhaps you can use some of these parts on a lawnmower or something, but you certainly can't use them on airplanes under this proposed rule.

Mr. IRELAND. I understand. The enforcement provisions of the proposed rule, would you gentlemen comment on your views about the enforcement provision?

Mr. CADWELL. Mr. Chairman, the enforcement provisions of this rule, mentioned in the title "Falsification of Airworthiness Certification Document" creates penalties for providing inaccurate or outdated information on an application.

By moving this whole parts manufacturers approval process toward a system that relies on the original manufacturer's part number and drawing revision number, the rule puts independent parts manufacturers in the position to inadvertently violate this rule and be subject to the penalties imposed by the rule, which would include being put out of the parts manufacturing business completely.

They seem a little extreme, given the problem they attempt to combat. Mr. Lawson may wish to supplement my answer.

Mr. LAWSON. Yes, the rule requires that if fraudulent—as the rule characterizes them—statements are made on application for a given PMA, not only is that PMA not granted, but the FAA may withdraw all PMA's that have been previously granted. Should that occur to an independent parts manufacturer, obviously, he is out of business. Now, we certainly, and I am sure you, would not condone any fraudulent statements which might have an effect on our safety, but to have the commercial version of a death sentence applied for what might very well be an inadvertent statement seems to us a bit extreme.

Mr. IRELAND. Thank you. Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Chairman. Did you find any evidence in the record that the FAA had considered any alternative method of achieving this goal in this particular regulation?

Mr. CADWELL. Mr. Lynch, the record, the formal record consists of the notice of proposed rulemaking and, no, it is not clear to us from that, but we do believe that there are other alternatives. Clearly, one alternative is keeping the existing rule. Others, however, may include things such as administratively improving coordination between FAA regions to eliminate that particular difficulty or work toward requiring a functional identicality and not a drawing identicality.

The rule FAA ought to be concerned about is requiring identicality of the part, not of drawings.

Mr. LYNCH. We have heard that a lot of PMA's don't really have much concern about this rule or haven't heard of it or whatever, that basically it is a few malcontents who are complaining to the subcommittee. Has the advocacy staff reviewed the docket both on this rule and prior proposals and could you go over a rundown of the commenters, who was in favor of this and who were opposed? Is it just a few people who commented?

Mr. CADWELL. Mr. Lynch, the record is fairly extensive in its rulemaking and there are numerous comments from small manufacturers and small users, whether they are small airports or mechanics, commenting on the impact of this rule on their ability to conduct their business.

Of course, the number or the size of the docket in any proceeding is dependent upon, in large part, the agency's efforts to solicit comments and that is one of the key purposes of the Regulatory Flexibility Act. Had the agency gone out and sought comments in this proceeding, who knows what we might have had here.

Mr. LAWSON. I might add that of those comments which are on the record, and this is based upon my recollection, the views opposed to this proposed rule far outnumber those which support the proposed rule. Interestingly, enough, the support for the FAA's rule comes basically from the OEM's.

Mr. LYNCH. You have gone over every comment submitted?

Mr. LAWSON. Yes.

Mr. LYNCH. Could you provide us with a breakdown?

Mr. LAWSON. Surely.

Mr. LYNCH. Just a general breakdown, whether for or against and who they were.

Mr. LAWSON. Is this for the record?

Mr. LYNCH. Yes, sir.

Mr. **Ireland**. You are out there in the boondocks doing your thing. You don't get up and read the Federal Register cover to cover every day and this is why the Regulatory Flexibility Act was passed. Is any factor in your opinion of, I will go along to get along. I have to deal with the FAA on a lot of other things and if I make the guy mad in the Los Angeles office, it is a trade-off. I may not be able to get some of the other goodies I need from the FAA. Do you think that maybe there are small businesses hanging back because they don't want to rock the boat?

Mr. **Lawson**. Mr. Chairman, I would rather not characterize the small businessman as lacking in courage.

Mr. **Ireland**. He may be prudent along this line.

Mr. **Lawson**. That could very well be true. We really don't have any evidence of that. If I were to take a guess, I would think there is a possibility of that and I think perhaps there is a greater possibility, given the really small nature of the companies in this industry, that they just economically can't support this.

Mr. **Ireland**. This leads me then into the question of evaluation of the great and monstrous burden on the FAA to do these PMA's? Is the FAA in your opinion so burdened and is this such an all-encompassing task that they need consultants out there doing it?

Mr. **Lawson**. Mr. Chairman, we really don't have any hard information, other than that which is available to you and we haven't even seen all that you have. The sparse information on the number of PMA's over the period of time covered by that survey and the number of man-hours devoted to it do not appear to be an overwhelming burden. However, in all fairness, I must say that I have no information as to the other duties that these individuals may have. I think that the gentleman who previously worked for the FAA and testified earlier has much better insight into it than do I.

Mr. **Ireland**. He said it wasn't any fun.

Mr. **Lawson**. I would agree with anything he said.

Mr. **Ireland**. It would be easy for the public to resurrect that famous word of "stonewalling" when one agency asks another agency, the FAA, for a comment back in March and here we are almost to August and nobody has given a formal answer to the request and there have been a number of oral conversations and such. In these conversations that you have had during that period of time with these people, have they alluded to this terrible burden that they have? Has that been up for discussion? Is that one of the things that they have been saying that they can't quite put it down on paper? Do they talk about it?

Mr. **Lawson**. What they have been talking about with us mainly is that they are relieving the PMA's of an administrative burden and that this rulemaking will be beneficial to the PMA's in that it will relieve them.

Mr. **Ireland**. It sure will. It will relieve them.

Mr. **Lawson**. One of the things I might say just in passing that we pointed out to the FAA was that if in fact that were true, that the economic impact of this rule was beneficial to PMA's, the Regulatory Flexibility Act requires that an impact statement be done because as you know, better than any of us here, the act is neutral as to beneficial or to adverse effect.

Mr. **Ireland**. Right. I have no further questions.

Mr. **Lynch**. In reading all the material that we put together for this hearing, talking to many people, it seems to me that the FAA sincerely believes that everybody really has misunderstood their intent concerning this proposal. To support our record, I would just like to ask if anybody at the Advocacy staff who worked on this rule had any particular knowledge of this industry before looking at this rule or not?

Mr. **Cadwell**. Mr. Lawson is the primary staff person who has worked on this rule and while I understand he has some military experience which familiarizes him with aircraft, I am not sure that it is sufficiently recent as to make him an expert on engineering so that he is better able to evaluate the technical specifications involved in approving aircraft parts than a small businessperson would be. Our staff professionals do not generally have the detailed expertise that the agencies have in rulemakings and, in fact, we don't view our job as having that expertise. We stand as members of the public reviewing what the agency publishes for the small business public.

Mr. **Lynch**. Which is a good argument for the agency to put essential information in the record.

Mr. **Cadwell**. The Regulatory Flexibility Act puts the burden on Federal agencies to analyze rules, not on the Office of Advocacy. We have a monitoring role and we try and analyze, given the information available.

Mr. **Lynch**. Thank you. I have no more questions, Mr. Chairman.

Mr. **Ireland**. Gentlemen, we thank you and with that, we have, I am told, in hand—where is it—we have the comment as we have alluded to up to this time of the Justice Department along the same lines as we have from the SBA and without objection, we will put it in the record as well.

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL 26 1982

Honorable Andy Ireland
Chairman, Subcommittee on
Export Opportunities and
Special Small Business Problems
Committee on Small Business
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In response to your letters of July 7 and July 16, 1982, I regret that we are unable to accept your invitation to appear before the Subcommittee to testify regarding the Regulatory Flexibility Act and Federal Aviation Administration Notice 77-19C, "Parts Manufacturers Approvals: Falsification of Airworthiness Certification Documents." The Department's views on the FAA's proposed changes in the regulation of aircraft replacement parts are outlined in our comments filed with the FAA in January 1978 and August 1981. As in other regulatory proceedings, our comments were intended to help ensure that the FAA, before adopting a final rule, consider the basis and justification of its proposals in light of possible competitive effects. As you know, the FAA has taken no further action in this matter. Accordingly, we do not believe we could contribute further to your inquiry into FAA implementation of the Regulatory Flexibility Act.

We appreciate your invitation to testify about this matter.

Sincerely yours,

William F. Baxter

William F. Baxter
Assistant Attorney General
Antitrust Division

Mr. **Ireland**. With that, we conclude our hearing. Thanks to everyone and we will be up and flying next Tuesday, same time, same station, to hear from the FAA. Thank you.

[Whereupon, at 1:48 p.m., the subcommittee adjourned, to reconvene subject to call of the Chair.]

OVERSIGHT OF REGULATORY FLEXIBILITY ACT
(Part 2)

WEDNESDAY, AUGUST 18, 1982

House of Representatives,
Subcommittee on Export Opportunities and
Special Small Business Problems,
Committee on Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room 2359-A, Rayburn House Office Building, Hon. Andy Ireland (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN IRELAND

Mr. Ireland. This morning the subcommittee is convened for the second time on the subject of a pending Federal Aviation Administration rulemaking entitled, "Parts Manufacturers Approvals; Falsification of Airworthiness Certification Documents."

I will not take time now to repeat all the allegations that the subcommittee has heard on this subject. Simply put, the subcommittee has been told by some parts manufacturer approval holders that this rule as proposed will put them out of business.

Today we will listen to what no doubt can be classified as the other side of the story since we will be told that the opponents of the rule have misinterpreted its intent. Before calling witnesses forward, I would like to place in the record the following letters, documents, and statements:

No. 1, a letter from FAA Administrator J. Lynn Helms, addressed to me, which includes responses to a series of questions that I sent to him on behalf of the subcommittee.

No. 2, a statement accompanied by supporting documents sent to us for the record by the General Aviation Manufacturers Association.

No. 3, a letter from Mr. Francis L. Filpowski, attorney, which is accompanied by a statement from the Aircraft Parts Corp.

No. 4, a letter from the Airline Services Association of which I would like to read just two very pertinent paragraphs says:

> I apologize for coming into this late. The Airline Services Association was still in the formative stages when the proposal was published. It was not yet paying enough attention to relevant Government regulations. Most of our members as small businesses neither subscribe to nor read the Federal Register and were unaware of the proposal at the time. In fact, we became aware of the proposal only because of the scheduling of hearings by the Small Business Subcommittee. Since final action has not been taken on the proposal, we hope you will take our comments into consideration.

We believe that withdrawal or major modifications of the proposal are essential and that the regulation, if republished, should be published again as a proposal for comment, accompanied by a regulatory flexibility analysis of the impact on small business.

[The exhibits referred to above follow:]

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Administrator

800 Independence Ave., S.W.
Washington, D.C. 20591

July 30, 1982

The Honorable Andy Ireland, Chairman
Subcommittee on Export Opportunities and
Special Small Business Problems
Committee on Small Business
House of Representatives
Washington, D.C. 20515

Dear Andy:

Thank you for your letter of July 29 seeking my input at a hearing before your Subcommittee. While I certainly understand that your Subcommittee may have issues it would like to explore with me personally, I am naturally concerned about the posture that would place me in. More specifically, as Administrator of the Federal Aviation Administration, I am the official who determines what final action must be taken concerning the Notice of Proposed Rulemaking being reviewed by your Subcommittee. I do not wish for there to be any public suggestion that I have prejudged the outcome of this rulemaking in any manner or that any specific action will be taken by the FAA prior to our having reviewed carefully all public commentary. In addition to the possibility that remarks I may make in response to questions could be misconstrued to reflect my views on the outcome of the rulemaking, I am concerned that future actions I may take not be the subject of unnecessary legal actions.

While I will assure that written answers are provided to the questions you have posed for me, I continue to believe for the reasons stated that it would not be appropriate for me to formally appear before the Subcommittee on issues related to the pending rulemaking. I am sure you will find that my senior staff who are scheduled to appear before you are fully qualified to respond to issues of concern to you.

Sincerely,

J. Lynn Helms
Administrator

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Administrator

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 16 1982

The Honorable Andy Ireland, Chairman
Subcommittee on Export Opportunities and
  Special Small Business Problems
Committee on Small Business
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed you will find my responses to the 13 questions you asked me to answer in your letter of July 29. I trust you will find them responsive to your inquiries.

Sincerely,

(signed) J. Lynn Helms
Administrator

Enclosure

1. It is my understanding that the Subcommittee staff has been provided a copy of the FAA's proposed guidelines for administering the Regulatory Flexibility Act. That document, now published in the Federal Register for comment, sets out the criteria which should be met before a certification is made that the various provisions of the Regulatory Flexibility Act do not apply. In that guidance material it is specified that, even if all findings are not made which would trigger a formal analysis, the rulemaking official should perform a regulatory flexibility analysis if he believes there exists a reasonable basis for doing so. FAA officials with regulatory issuance authority are delegated the authority of the Administrator to make appropriate certifications, findings, and determinations under the Regulatory Flexibility Act.

2. The Los Angeles office was reorganized recently. However, this was not due to any specific problems associated with that office, but as part of an overall program instituted in January 1980 to achieve a higher level of effectiveness, standardization, and accountability in aircraft certification matters.

Prior to January 1980, the FAA had 12 regional engineering and manufacturing offices with complete responsibility for all aircraft certification activities within the region's geographic area. Rulemaking and development of policy and guidance was the responsibility of FAA Washington Headquarters. The lead region program was then established in which certain regions were assigned staff functions previously performed by Washington elements. Certification responsibility for certain aeronautical products was transferred from the regions to the single region with the greatest degree of expertise in that product. The Los Angeles office was subdivided into two groups at that time. One group was located at Long Beach to handle transport airplane certification activities as part of the Northwest Mountain Region; the other remained at Hawthorne as part of the Western Pacific Region to handle all other aircraft certification matters within the region.

The most recent organizational change, which occurred on February 1 of this year, further refined the lead region concept with the implementation of the Aircraft Certification Directorate Program. Four directorates were established, each responsible for management of resources within their geographic boundaries and for policy guidance to all field offices for a particular class of aircraft or engines and propellers. The aircraft certification organizations of the Alaskan region and the former Western, Northwest, Rocky Mountain and Pacific regions were merged into the Transport Airplane Certification Directorate which became a part of the Northwest Mountain Region. Thus, the activity at Hawthorne became the Western Aircraft Certification Field Office reporting through the Los Angeles Area Aircraft Certification Office at Long Beach to the directorate in Seattle.

Washington Headquarters, in carrying out its assigned responsibilities to review regional actions and evaluate the technical aspects of regulatory and policy actions in progress within the directorates, reviews field operations on a continuing basis to ensure consistency across directorate lines.

3. We have not seen evidence of a serious safety problem with parts which have been granted a PMA approval, however, the statement quoted from the record is not accurate.

Preliminary review of our records for the past 10 years discloses several airworthiness directives (AD) issued for equipment produced by PMA holders. Thus, the quotation is incorrect in its assertion that no action has ever been taken against PMA parts. In addition, it incorrectly implies that the FAA has part recall authority. The FAA has the authority to issue an AD against an approved product which requires corrective action. It is in this manner, not by recall, that unsafe features are corrected.

4. While FAA has never been denied access to any requested data, the OEM's are concerned about their proprietary rights and have indicated that the release of proprietary information may restrict the free exchange of data and information that now exists. In this regard, it is significant to note that OEM's are required by FAA regulations to make available all of the data to the FAA that is necessary to define the type design.

Attached are some communications on the subject matter.

5. The FAA places in the docket of a rulemaking action the basic notice of proposed rulemaking (which sets out the reasons and rationale for proposing a rule) along with any comments or information provided the FAA by the public in response to the proposed rulemaking action, and any final rulemaking action taken by the agency. To that extent, all pertinent information related to the rulemaking is included in the docket. As a general rule, the FAA does not place in a rulemaking docket internal studies or recommendations relating to the proposed rulemaking other than a regulatory impact analysis or regulatory evaluation when required by Executive and DOT Order, although if these materials constitute a basis for

final agency action on the rulemaking, the rationale contained in them is explained by the agency.

6. Designated Engineering Representatives (DER) are private persons who are authorized to examine and approve for the Administrator certain engineering technical data. A DER's approval certifies that the data accompanying that certification shows compliance with applicable specified airworthiness regulations. Section 314 of the Federal Aviation Act (the Act) allows the Administrator to ". . .delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business or function ...." Part 183 of Title 14 of the Code of Federal Regulations specifies regulations for implementation of the provisions of the Act regarding representatives of the Administrator.

There are well over 16,000 designees appointed in various fields of activity including:

Mechanic Examiner
Parachute Rigger Examiner
Engineering Representative
Manufacturing Inspection Representative
Alteration Station
Delegated Option Authorization
Pilot Examiner
Aviation Medical Examiner
Safety Counselor

Of the over 900 DERs, approximately 40 percent are independents and not affiliated with a specific company. These independent DERs encompass several technical disciplines and are located throughout the country.

7. The letter from the FAA to Mr. Manhan does indeed conform to proper FAA procedures governing Designated Engineering Representatives (DER). Mr. Manhan in his testimony did not properly present the facts and events which led up to the FAA suggestion that he contact a DER to assist in obtaining FAA PMA approval for a specific item. The correct facts and events are necessary to properly understand the FAA letter.

Execuair, through Mr. Manhan, applied for PMA approval of its part as a replacement to a Whittaker Controls part. The PMA application was based on a statement by Execuair that their parts were identical to the Whittaker parts. As with other PMA applications, it was necessary for the FAA to compare the Execuair data with the Whittaker data to validate the identicality of the part, as is our practice under the present PMA policies. Mr. Manhan was contacted by phone and advised that due to the present project workload, the FAA would be unable to complete the necessary drawing review in accordance with the time schedule desired by Mr. Manhan. It was then suggested by the FAA that a DER might be used to make the identicality finding and this would probably enable Mr. Manhan to receive his PMA earlier than would occur if an FAA employee made the identicality finding. During the conversation between the FAA and Mr. Manhan it was discovered that Execuair intended to apply for many additional PMA approvals of Whittaker parts and the DER arrangement was mutually agreed upon as a method for Execuair to obtain future approvals in a more timely manner.

The FAA does not as a regular practice specify a specific DER to applicants but merely makes available a list of those persons with DER authorizations and the technical limits of their authorization. In this case, since the drawing needed to prove identicality of the Execuair parts physically resided at the Whittaker plant (a common practice to avoid duplication costs to manufacturers and filing expenses to the FAA), it was necessary to obtain Whittaker's approval to allow a DER, a private person, access to Whittaker proprietary data. This specific DER recommended in the FAA letter was one acceptable to Whittaker and was previously discussed with and approved by Mr. Manhan in a telephone conversation. The letter was merely final confirmation of material previously discussed over the phone and official confirmation of our acceptance of this arrangement.

In his testimony before the Committee on July 20, Mr. Manhan discussed the economic disadvantage to him of having to pay the DER for his services. This is a common practice as many DERs are privately employed. It is important to note, though, that Mr. Manhan could have received his PMA approval without DER assistance.

The irony of the whole thing is that the dissatisfaction evident in Mr. Manhan's testimony before the Committee, and the need in this case to obtain DER assistance for PMA approval in accordance with Mr. Manhan's time schedule, are the very things that the FAA proposed to alleviate in its intended rulemaking.

8. If the existing PMA regulations were to be administered literally, there would be little burden imposed upon the FAA. However, policy guidance has been issued which relieves the PMA

applicant of the burden of submitting all the detailed information which is necessary to show that the design of the part is identical to the design of a part covered under a type certificate. The burden to the FAA arises from contacts and correspondence with the PMA applicant and the holder of the approved design, and in FAA making the necessary comparisons to establish design identicality.

The FAA has not complained to either Congress or OMB about these burdens because the PMA rules are within the FAA's authority to administer and amend.

9. Industrial espionage is not within FAA's regulatory authority. Trade secrets, however, are protected from disclosure by a criminal statute, 18 USC 1905. Therefore, every agency must be conscious of the duty to protect such material from disclosure. To the extent that we have custody of material which is claimed to be, or appears to be, a trade secret, our employees must make a judgment whether such material must be protected. Competing claims as to whether a particular item is a trade secret or not arise sometimes in the Freedom of Information Act context, and we do our best to resolve them fairly. It has always been our position that we cannot go beyond telling an applicant for an "identicality" PMA that his design does or does not meet the identicality standard. Because any disclosure as to the particulars of a design could result in a criminal violation under section 1905, we must refrain from giving out such details.

10. The November 4, 1981, letter from the Small Business Administration (SBA) did not complain that the "Regulatory Flexibility Act was not correctly adhered to in FAA Notice 77-19C." The letter did say ". . . we urge the Administration to take cognizance of the perceptions of these small entities and consider the preparation and publication of an initial regulatory flexibility analysis which meets the requirements of Section 603 of the RFA."

Subsequently, in its second submittal to Docket 17147 on March 3, 1982, the Chief Counsel for Advocacy expressed his judgment that "FAA's attempt at certification of this rule under RFA is improper and the proposal should be withdrawn and republished with an initial regulatory flexibility analysis as required by the RFA." That judgment was based upon 15 pages of submitted analysis of the technical substance of Notice 77-19C, which conveys to us a misunderstanding of the intent of our proposal.

In the cover document submitting comments and an assessment of NPRM 77-19C, the Chief Counsel for Advocacy requested "that the Administrator consider the relevancy of the attached comments to the above-titled rulemaking." It is obvious that the submittal of March 3, 1982, was intended as comments to the docket and was treated in that manner. The SBA comments of November 4, 1981 have been docketed along with all other comments received.

The FAA's practice, and we believe it is a general practice in most government agencies, is not to respond to individual comments on a proposed rule. To do so might lead to charges by some of prejudgment by the agency. It also could lead to a serious administrative burden if all comments were answered or to charges of favoritism if only certain commenters were favored with a response. The FAA does respond to all significant comments in the preambles of any final rules that may be issued.

Although we have not responded in writing to the issues SBA raised, FAA staff did meet informally with their staff on November 5, 1981, prior to actually receiving their November 4 letter. In terms of the substance of their comments concerning their opinion that we did not comply with the Regulatory Flexibility Act, we have decided that, if any rules are promulgated in the PMA proceeding, their effectivity will be delayed until after the public is provided an opportunity to comment on a final regulatory flexibility analysis. That analysis will be performed whether or not we conclude that it is required by law.

11. The statement by a representative of Superior Air Parts is a misrepresentation of the facts. On the very same day that the FAA denied a request for extension of the comment period on Notice 77-19C to Superior Air Parts, it also denied a similar request by Avco-Lycoming. Thus, there was no preferential treatment given to Avco-Lycoming, an OEM, over Superior Air Parts, a PMA holder, as alluded to by the witness.

Some background is necessary to understand the procedural differences between Notice 77-19 and Notice 77-19C, and why we granted an extension, at the request of Avco-Lycoming, to the comment period on Notice 77-19, yet initially denied such requests for Notice 77-19C. NPRM 77-19 was published with a 60 day comment period and no period for rebuttal or reply comments to original comments. The Avco-Lycoming request was granted to allow reply comments to be submitted to the docket on late-filed Superior Air Parts comments. In view of the experience gained from the above events, NPRM 77-19C was published with an initial 90 day comment period and a 30 day reply comment period. This unusual comment procedure was designed to allow ample time for initial comments, an additional period for interested persons to review the comments and provide rebuttal comments if desired, and ensure fairness to all. It is because of this comment/reply procedure used in Notice 77-19C that the FAA initially denied both Superior Air Parts and Avco-Lycoming requests to open the comment period.

In general, the FAA responds to comments received on a notice of proposed rule making in the preamble of the final amendment. In case of a request for extension of the comment date, the response, if a grant is involved, is contained in the notice of extension of time. It is our normal practice to forward a copy of the notice extending the comment period to the requestor. However, to avoid an undue workload, we do not write a cover letter, so we have no way to document that a copy was sent to Superior Air Parts in this case. If a copy were not sent, it was inadvertent. It should be noted that Superior Air Parts comments were received prior to the closing date of the reopened comment period.

12. The FAA seeks to comply fully with all aspects of the Regulatory Flexibility Act. I believe our proposed guidelines for administering the Act show our good faith in doing the best job we can in carrying out the spirit and intent of the Act. Testimony of the Small Business Administration before your Subcommittee last year reflected favorably on the efforts made by DOT and FAA to properly administer the Act. I would go further to state that the Regulatory Flexibility Act is fully consistent with my own views on regulation. Since assuming the role of FAA Administrator, I have worked to regulate only to the extent required for safety and to undertake efforts to deregulate while assuring that aviation safety is maintained.

13. Attached are copies of correspondence furnished by our Los Angeles office on the subject matter. Since some of the material in the letters is proprietary information, we have removed small portions of material from the letters.

The attached letters clearly show a major administrative burden on the FAA, Whittaker Controls, and Execuair, the PMA applicant, in the limited number of approvals sought in this correspondence. Multiply this burden by the number of applications per year and you can clearly see the magnitude of the burden Notice 77-19C is intended to relieve. In addition, the attached letters show the sophistication of the parts for which PMA approval is being requested and the detailed process specifications that are necessary to establish identicality to the degree necessary to ensure airworthiness. The letters further indicate that some very significant changes are made to parts from one drawing revision letter to another.

Attachment Concerning
Question 4

**General Aviation
Manufacturers Association**

Suite 1215
1025 Connecticut Ave., N.W.
Washington, D. C. 20036
(202) 296-8848

AOA#: 248
ACTION/~~INFORMATION~~: AGC-1
DUE DATE(S): 3/22/78
FOR SIGNATURE OF:
COORDINATION WITH/THRU:
INFORMATION COPY: APA-1/AFS-1/
S

March 10, 1978

Honorable Langhorne Bond
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Bond:

The General Aviation Manufacturers Association has been advised by Cessna Aircraft Company that the FAA's Northwest Region intends to allow a review by Advanced Systems Technology, Inc., of the Type Inspection Report for the Cessna Model 500 aircraft. This is pursuant to a request made by Advanced Systems Technology and an FAA determination that the FAA records are releasable under the Freedom of Information Act.

On behalf of all its members, GAMA strongly protests this action on the grounds that the information that FAA intends to release is privileged from disclosure under the Freedom of Information Act, has been developed at great expense by the company (Cessna), and is commercially valuable. The precedent that would be established by the release of this data would be economically disadvantageous to all GAMA member companies, would restrict the free exchange of data and information that now exists between FAA and our companies.

The Freedom of Information Act is not intended to facilitiate the release of proprietary information which can be utilized in a commercial fashion by an outside party.

We would appreciate your immediate attention to this matter.

Sincerely,

E. Edward Stimpson

Edward W. Stimpson
President

REC'D
MAR 10 3 2 PM
OFFICE OF
ADMINISTRATOR
FEDERAL AVIATION
ADMINISTRATION

DOUGLAS AIRCRAFT COMPANY

3855 Lakewood Boulevard Long Beach, California 90846
(213) 593-6243

JOHN M. CARROLL, JR.
CHIEF COUNSEL

June 16, 1980
C-Legal-1010

Mr. F. J. Karnowski
Acting Chief, Aircraft Engineering Division
Department of Transportation
Federal Aviation Administration
P.O. Box 92007
Worldway Postal Center
Los Angeles, California 90009

Dear Mr. Karnowski:

We have received your letter AWE-101-1210-2 dated June 11, 1980, concerning our initial response to the Air Line Pilot Association's (ALPA) Freedom of Information Act (FOIA) Request transmitted to MDC by your letter AWE-104:1202-2 dated June 4, 1980.

Before we set forth our detailed arguments in support of our claim that the requested information is proprietary or privileged and exempt from disclosure under the FOIA, we would like to outline our view of the climate in which we, as a United States aircraft manufacturer, must compete. Over the last few years the competition between manufacturers has become intense. Not only is the competition between U.S. airframe manufacturers intense, but we are now faced with real competition from the European manufacturers. Airlines which in the past had fleets made up totally of U.S. manufactured aircraft are now adding large numbers of aircraft manufactured by a consortium of European manufacturers. Technology in the areas of fuel usage, aircraft performance, and noise which in the past had less significance are now among the prime motivations in purchasing aircraft. In short, we as a manufacturer are living in an intensely competitive climate where we are continually improving our products, and we must make every effort to protect our proprietary investment.

With regard to any request for information, we must view it not in the framework of who is requesting it but more importantly with the view that once it is divulged it becomes public information. This is true not only in the legal sense of publication of proprietary information to third parties but also in the sense that we lose control over its future use and dissemination. We must, therefore, make our arguments toward the broadest use that could be made of the information divulged.

Set forth below are our detailed arguments in support of our claim that the information and data requested by ALPA submitted in confidence by MDC is exempt under the FOIA and should not be disclosed:

1. THRUST SETTING INFORMATION. This information reveals our technical computations such as the installation losses, inlet losses, outlet losses and generator loads associated with our use and installation of the Pratt & Whitney JT8D-209 engine. These trade secrets were developed making use of an engine which is available commercially to any other manufacturer. Disclosure would make this information available in an organized fashion and without charge to the requesting party and eventually to our competitors. If this information were not disclosed under the FOIA, competitors would have to make their own computations and conduct their own studies at their own cost to obtain comparable information.

2. ABNORMAL CONFIGURATION SPEED CHART. This information uses our preliminary technical computations and figures which are subject to change. Disclosure would make this information available in an organized fashion and without charge to the requesting party and eventually to our competitors. In addition, the information is preliminary and subject to misinterpretation or misuse by our competitors and customers.

3. PERFORMANCE SUMMARIES AND AIRPORT ANALYSIS. This data was prepared for a special purpose and utilizes technical data computed in a very conservative manner. It does not necessarily represent the performance that could be obtained by the DC-9 Series 80 using the final certificated performance material. While not on its face harmful to MDC if used properly and with the proper explanations, it could easily be used in its raw form to infer alleged deficiencies in the aircraft which have no basis in fact.

4. CHECK LISTS. Again, this information will reveal the equipment in the aircraft, the parameters of the equipment and the techniques MDC has developed to utilize this equipment. This effort was accomplished entirely at private expense over a long period of time. Again, this information is preliminary and since it does not necessarily represent the final product it could be used to misinterpret the capabilities of the DC-9 Series 80 aircraft.

While you have indicated that you would stipulate as to the tentative nature of the abovelisted items, such a stipulation does not prevent the misuse of the information by our competitors. More importantly however, dissemination of the requested information would be harmful to the competitive position MDC has worked to establish over the last 3 years with this advanced State-of-the-Art aircraft. In particular, it is in the very areas that you propose to disclose information that MDC has obtained an advantage over its competitors. Performance and cockpit design are key areas in making the DC-9 Series 80 a superior aircraft. Dissemination of this information would provide answers to questions our competitors may have about the DC-9-80 aircraft.

5. DC-9-80 TWO MAN CREW EVALUATION. The MDC prepared report and the final reports and official recommendations prepared by the FAA based upon our report contain evaluations and results which are estimated, predicted and very conservative, which, if released to competitors and detractors, could be used out of context. This material includes statements indicating certain problems which may be used out of context and without explanation as to the preliminary nature and developmental status of the material. The FAA surely recognizes that this material was prepared for a special purpose without knowledge that it would be made public. Preliminary reports and evaluations are prepared with the specific knowledge that changes will be made. This information does not reveal the work which has been accomplished by MDC in the furtherance of the certification process. Dissemination of this information will be harmful to MDC's competitive posture by revealing preliminary information which does not reflect the action we have taken to correct minor problems.

The basis for our objection to disclosure of the requested information is the following:

(1) The material is trade secret and commercial information submitted in confidence and therefore is exempt from disclosure under Section (b) (4) of the Freedom of Information Act (5 USCA 552) and Title 49, Section 7.69 of the Code of Federal Regulations; and,

(2) The Federal Trade Secrets Act (18 USCA §1905) makes it a crime for an officer or employe of the United States to make known in any manner information coming to him in the course of his employment which concerns or relates to trade secrets, processes, operations, style of work or apparatus.

(3) The information and data which the FAA proposes to disclose represents preliminary working data subject to final confirmation and review before formal aircraft certification occurs. Until final certification occurs, the very nature of the information dictates that it not be released in any form. The certification process proceeds from initial conceptual design through detail design to hardware manufacture and assembly. Throughout that process the design and data obtained is in a constant state of change. The potential for misuse by both competitors and customers is real and there is no vehicle for the originator of this information to control and revise the information after such a dissemination. We, therefore, believe that disclosure of information at any point prior to final certification gives a false and misleading picture which can cause permanent and irreparable harm.

We believe that the following additional points are pertinent to whether or not the FAA discloses the requested material:

- Beginning in 1964, MDC has made its position clear that any documents submitted to the FAA were submitted in confidence and were not to be disclosed to third parties. Our position, then as now, is that material we submit, unless otherwise stated, is proprietary, and if disclosed would adversely affect our interests.

- MDC and the FAA have established a working relationship over the years which has resulted in the kind of clear and unhindered communication which is required in the lengthy difficult certification process. To date this process has not been obstructed by the type of formalities which we and other manufacturers may be required to institute in view of your proposed dissemination of this information. Of course, no single act will impair the necessary communication of information we have enjoyed in the past through voluntary cooperation. However, we must view your proposed disclosure as a factor in any future communication of information.

- We quote from the prepared statement of Langhorne Bond, Administrator, Federal Aviation Administration contained in the record of hearings before a subcommittee of the Committee on Government Operations, House of Representatives, Ninety-Fifth Congress, Second Session, September 26 and 28, 1978, beginning on page 415:

  > "I am greatly concerned by the fact that ALPA has chosen to raise the issue of the "openness" of the certification process in its quest for a three man DC-9-80 crew." . . . " 'Opening' the certification process by inserting the ALPA will not enhance safety. The certification of U.S. manufactured aircraft depends upon the free flow of proprietary data between the FAA and the manufacturers. By inserting ALPA or any other third party, the protection afforded by law to the U.S. manufacturer's proprietary data will be lost. The impact this would have on safety would be immediate. The impact of the loss of the protection afforded this proprietary data by law on the sale of U.S. aircraft and, concomitantly on U.S. jobs plus the balance of payments would be devastating." (Pages 426 and 427)

- MDC would still be agreeable to a confidential disclosure of the information requested by ALPA subject to the conditions set forth in our previous letter to the FAA on this subject dated June 9, 1980 (Reference: C-Legal-977).

We hope, therefore, that the FAA's consistently held position on which we have relied in the past will not change in the middle of this certification process. MDC will continue to work with the FAA in a spirit of cooperation as we have in the past. However, we trust that the FAA understands that we must make every effort to protect our proprietary investment.

Very truly yours,

John H. Carroll, Jr.

Attachments Concerning
Question 13

APR 1 [illegible]

Whittaker Controls
Attn: Bruce Richards, Product Manager
12838 Saticoy Street
North Hollywood, California 91605

Gentlemen:

This letter is in reference to your Whittaker letters to FAA dated November 14, 1980 and July 28, 1980 asking that FAA rescind PMA approvals granted to Execuaire on P/N's E-109498 and E-221408 based on FAR 21.303.

The FAA has found that the reference designs meet the airworthiness requirements of the FAR's applicable to the product. The applicant was therefore entitled to a PMA approval subject to satisfactory quality control procedures.

If Whittaker has evidence that shows an unsafe condition exists with these parts, then the FAA will consider action under the provision of FAA Part 39 by prescribing, as appropriate, inspections and the conditions and limitations, if any, under which those parts may continue in service. We have no information that any service difficulty currently exists nor that a poor FAA judgement is indicated.

Sincerely,

Orig. signed by
F. J. Karnowski

F. J. KARNOWSKI
Chief, Engineering and
Manufacturing Branch

File: 8123 ~~8110-5~~ PMA Whittaker
8123 PMA Execuair

AWE-214:HFerris:X6381:4-8-81:DC/MV:FS517D22X

CONCURRENCES
RTG SYMBOL 214
INITIALS/SIG
DATE 4/10/81
RTG SYMBOL
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WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12638 Saticoy Street
North Hollywood, California 91605
213/765-8160

Action AWE-314
Let me have your comments on how to respond.
Jake

Aircraft Engineering Div.
Rec'd:
NOV 17 1980
Control 3157-80
Date Ans.
File Code:

November 14, 1980

Federal Aviation Administration
Western Region
P.O. Box 92007, World Way Postal Center
Los Angeles, California 90009

Attention: Mr. F. J. Karnowski, Chief
Aircraft Engineering Division

Subject: Disc, Butterfly Valve - Whittaker P/N 109498

Reference:
(1) Whittaker Drawing 109498, Rev. C
(2) Whittaker Drawing 109498, Rev. A
(3) Whittaker Drawing 105281, Rev. G, dated 5/12/69
(4) Execuair Letter to FAA, 8/25/78
(5) AWE-140:HRK:8123:CT7670WE, dated 10/13/78
(6) Execuair Letter to FAA, 10/17/78
(7) Execuair Production Approval Listing - Supplement No. 3, 10/26/78
(8) AWE-140:HRK:8123:PMA Execuair
(9) AWE-180 dated 1/26/79

Note: This correspondence (with enclosures) is considered exempt from disclosure under the Freedom of Information Act.

Gentlemen:

A review of documents supplied to us under the Freedom of Information Act has revealed a situation regarding the subject valve component which we feel should be brought to your attention.

References 4, 5, 6, and 7, attached hereto, deal in part with the PMA process for Execuair P/N E-109498 Rev. A, said to be a replacement for our P/N 109498 Rev. A (Ref. 2). The current Whittaker drawing, 109498, Rev. C, dated 5/21/67, is enclosed herein as Reference 1.

It is our understanding that the PMA applications which resulted in the issuance of Supplement No. 3 (Ref. 7), were processed by the FAA prior to the completion of an agreement between the FAA and Whittaker Controls to cooperate on such applications to insure that identicality with current production units, did in fact, exist.

8123 PMA Whittaker 2826

Regretably, we believe that the documentation herein enclosed reveals that substantial differences exist between the "A" drawing of the "C" drawing, in use at Whittaker for over eleven years. Further, we believe the documentation reveals that the application was incomplete. Our conclusions in this matter were arrived at as follows.

a) The original application, Ref. 4, neither reveals that the subject drawing is made from a casting, nor does it include application for PMA on the casting. Neither prior nor subsequent production approvals refer to the basic casting (Ref. 3) and we therefore have concluded that no PMA exists. We believe this lack of supporting documentation in and of itself constitutes a reversible error in the PMA process.

b) The "C" revision drawing (Ref. 1) differs from the "A" drawing in three significant areas.

1. Material: The old drawing asked for material, the new drawing for

- For your review, the cognizant physical and chemical characteristics of the two materials are listed below:

CHEMICAL COMPOSITION - %

	Ni	Cu	Fe Max.	Mn Max.	C Max.	Si
Old:						
New:						

On the old material, the copper content can be calculated to be a minimum of and a maximum of

PHYSICALS

	Tensile	Yield	Elong	Brinell
Old				
New				

Clearly, these two specifications describe widely differing materials, the latter offering higher strengths in all areas and yet providing greater elongation to promote improved toughness. The current material specification, specifically designates composition as high strength, high corrosion and high abrasion resistant material.

2. The current drawing for both our casting and our machined part, (ref. 3 and 1 respectively) require a cautionary procedure to prevent contamination of the part with This

3826

caution warning represents a quality control procedure, not contained in the A drawing and not duplicated in the material specifications, either old or new. Our Quality Assurance Department applied this warning to the drawings in 1969 as a result of service connected difficulties being encountered in this part. Customer complaints of rapid localized erosion of the part were traced directly to contamination of the base nickel with
The elemental nickel which forms nearly two-thirds of this casting has a high affinity for these contaminates and in the presence of one of them, combines to form a eutectic which has a much lower melting point. Additionally, such contamination leads to intergranular corrosion which severly weakens a part so exposed.

Rigid quality control to prevent such contamination has ended the customer complaints which brought about this critical cautionary note.

3. The original drawing refers to a finish: Dry lubricant finish per The current specification lists nine (9) varying procedures to be selected by Engineering to meet various applications. The current disc drawing refers to Our document does not identify the single procedure used in the original document over twenty years ago. Therefore, Execuair has no access to the proper dry lubricant procedure for this critical high temperature high abrasion application.

In view of the documented evidence contained herein, and with the precedent established in references 8 and 9 wherein the FAA rescinded a Design Approval which had been erroneously granted, Whittaker Controls believes that the FAA should act in the best interests of the aviation industry and withdraw its PMA approval for Execuair P/N E-109498.

Very truly yours,

Bruce L. Richards

Bruce L. Richards
Product Manager

BLR/tp

Enclosures

8123
PMA

4 of 26

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765-6160

Whittaker

Aircraft Engineering Div.
Rec'd: 140

JUL 30 1980

Control 2944-80
Date Ans
File Code:

July 28, 1980

Department of Transportation
Federal Aviation Administration
Western Region
P.O. Box 92007, Worldway Postal Center
Los Angeles, CA 90009

Attention: Mr. F. J. Karnowski
Acting Chief, Aircraft Engineering Division

Subject: PMA Application, Valve Body Assembly
P/N 221408

Reference: FAA letter dtd. 7/23/80, AWE-140:
HWF:8123 PMA Whittaker

Gentlemen:

I was shocked at the FAA's decision to grant a PMA for subject part on other than an identicality basis, particularly without reviewing the test procedure with us or others having the detailed knowledge and background required.

We are evaluating this matter to determine the best course of action to take, as we firmly believe an unsafe flight condition could be caused by this part if it has not been adequately qualified by test. It would greatly expedite our evaluation if we could have the opportunity to review the test procedure used to qualify this part. Under the circumstances, I certainly would not think there would be any trade secret issues connected with the test procedure.

Your expeditious reply would be appreciated.

Very truly yours,

Joseph Stevens

Joseph W. Stevens
President

hb

5 of 26

cc: J. A. Calfas, Esq.
A. D. Jacobson, Esq.

8123 PMA

Eng. judgment. no safety data

JUL 2 3 1980

In Reply
Refer To: AWE-140:HWF:8123 PMA Whittaker

Whittaker Controls
12838 Saticoy Street
North Hollywood, California 91605

Attention: Mr. Joseph W. Stevens, President

Subject : PMA Application, Valve Body Assembly, P/N 221408, used on Bleed Air Valve, P/N 129525, and other parts

Reference: (a) FAA letter to Whittaker dated January 4, 1980, requesting latest change letter information per FAA/Whittaker agreements

(b) Whittaker letter to FAA dated February 18, 1980, regarding reference (a) letter

(c) Whittaker letter to FAA dated February 20, 1980, on subject PMA request

(d) Whittaker letter to FAA dated March 7, 1980, regarding reference (a) letter on PMA requests

(e) Several 1980 conferences at Regional Office between Messrs. H. Ferris, FAA and J. Stevens, B. Richards and T. Conway of Whittaker on subject PMA applications

Gentlemen:

This is to acknowledge the reference (b) through (e) letters and conferences at the Regional Office and to thank Whittaker Controls for the cooperation and assistance received in response to our reference (a) letter.

Based on the agreements reached on both sides of the PMA legal controversies for granting PMA approvals within the requirements of FAR 21.303, we have granted and denied PMA's of reference (e) which were requested on identicality. As a result of our last reference (e) conference, the following parts were denied PMA because of a "no-go" situation. These were:

134217, 151769, 152060, 151992, 1311228-1, 105522, 153448, 123857, 130550, 130549, 151072, 151137, 150229, 152072, 22995, 152092

The balance of PMA requests listed in reference (a) letter have been granted since Whittaker agreed with a "Go" finding or could not show a "no-go" situation at the reference (e) meeting.

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CONCURRENCES		
RTG SYMBOL	INITIALS/SIG	DATE
140		
141		7/22/80
-106		7-23-80
-100		

The granting of a PMA on the subject valve body was based on an airworthiness finding per FAR 21.303(c) and (d)(1) rather than identicality. This finding was influenced by the inputs of your reference (c) letter, an approved qualification test report based on an approved plan, FAA witnessed test and successful conformity inspection, a review of the detail parts which showed 100% similarity with the latest approved body design, if not 100% identicality, and telecons with Whittaker which indicated that no unsafe conditions exist to previously approved housings. Additionally, of the 3 valve body designs presently in use by the airlines, the approval was granted on the latest valve body which is obviously more structurally sound than the previous designs. We do not believe that a complete requalification test or original type certification was warranted nor required by the Federal Aviation Regulations for this detail component of the valve assembly. We stated to the applicant, however, that any assembly of parts that could affect the valve natural frequencies would require a complete vibration survey and qualification test under the appropriate environment.

Your letter of reference (c) agrees with our engineering finding when you stated, at the end of page 2, that "It is of vital importance to note that simple vibration of the body itself is of absolutely no significance." That is why the valve body qualification test included a proof pressure test and function/reliability (F&R) test but not a vibration test. Please note that a PMA is not being granted for the valve assembly nor a redesigned valve body.

We appreciate your inputs and welcome them in the future but, if no unsafe condition exists, i.e., no Airworthiness Directive has been issued, we must assume that a part is eligible for PMA when testing shows the part meets the airworthiness requirements of the FAR's.

Sincerely,

Orig. signed by
F. J. Karnowski

F. J. KARNOWSKI
Acting Chief, Aircraft Engineering Division

cc: AWE-180(2), 140

File: 8123 Whittaker Controls, PMA

CN: 2640-80

AWE-140:H.FERRIS:x5381:7/14/80:DC-dn:AE772H18X
REV:MARY:7/15/80:Rev.mk-7/18/80

70 24

RECORD OF ☐ VISIT ☒ CONFERENCE OR ☐ TELEPHONE CALL 10:00 - 12:00 4/8/80

NAME(S) OF PERSON(S) CONTACTED OR IN CONFERENCE AND LOCATION

H. FERRIS, AWE-140 MET WITH WHITTAKER CONTROL PERSONNEL IN AWE-100 OFFICE

JOE STEVENS, PRES; TIM CONWAY, V.P.; B. RICHARDS

ROUTING	
SYMBOL	INITIALS
140	HF
100	

SUBJECT

FAA REQUEST FOR WHITTAKER DRAWING INFO OF 1-4-80

DIGEST

TO COMPLY WITH THE SUBJECT REQUEST, WHITTAKER REQUESTED A MODUS OPERENDI ACCEPTABLE TO FAA SINCE SOME DRWGS ARE OBSOLETE AND ANCIENT WITH MANY EO'S DIFFICULT TO OBTAIN. THE FOLLOWING PROCEDURE WAS AGREED UPON:

1 - WHITTAKER WILL REVIEW & RESEARCH EACH REQUEST FOR EO'S THAT EFFECT AIRWORTHINESS AND PRESENT INFORMAL SUMMARY OF FINDINGS AT RO. THE REQUESTS WILL RESULT IN GO/NO GO DRAWINGS, WITH A MINIMUM OF FAA ENG'G TIME, AND WILL FOLLOW GEN'L GUIDELINES OF WHITTAKER LTR OF 2/18/80. THE ABOVE WILL RESULT IN 3 CATEGORIES

A - GO WHITTAKER & FAA AGREES
B - NO GO " "
C - NO GO FAA REQUESTS ADDITIONAL SUPPORT

2 - THE FAA LTR TO PMA APPLICANT WILL NOT DETAIL REASONS FOR NO-GO DECISION

CONCLUSION, ACTION TAKEN, OR REQUIRED

3 - FOR GO DRWGS, WHITTAKER WILL INFORM FAA OF NEXT ASSY & USAGE INFO FOR TOP ASSY FOR FAA COMPARISON WITH APPLICANT DATA

SYSTEM WILL BE TRIED & INFORMAL MTG PLANNED FOR WK OF 4/14/80

DATE	TITLE	SIGNATURE
4/8/80	PROJ. ENGR	Hal Ferris

FAA Form 1360-33 (4-73) FORMERLY FAA FORM 1532

U.S. GOVERNMENT PRINTING OFFICE: 1977-774-000

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765-8160

Whittaker

March 7, 1980

Aircraft Engineering Div.
Rec'd: 140 — JA-HF
MAR 12 1980
Control: 2599-80
Date Ans.
File Code:

Federal Aviation Administration
Western Region
P.O. Box 92007, Worldway Postal Center
Los Angeles, CA 90009

Attention: Mr. F. J. Karnowski, Acting Chief
Aircraft Engineering Division

Subject: Execuair Company's Request for PMA on Whittaker Products

Reference: (a) FAA ltr. dtd. 1/4/80, F.J. Karnowski to F. Larango, AWE-140:HRIC:8123 PMA

(b) Telecon 3/5/80, J.W. Stevens and F.J. Karnowski

Gentlemen:

This letter is to confirm agreements reached in the reference telephone conversation.

A number of problems have arisen concerning the method of obtaining the necessary information from Whittaker in order to determine Execuair's identicality pursuant to issuance of PMA. Several problems discussed were:

1. Certain of the drawings requested in reference (a) have not been released for production use. Obviously, simply sending those drawings to the FAA without some additional examination and explanation would be inadequate for a correct determination.

2. Reference (a) request contains drawings and revisions which are 10 to 25 years old and to locate any significant design changes will require a tedious search through our archives. It should be realized that this will take time because the administrative workload is significant. We will, of course, do the work in the interest of providing the FAA with accurate information.

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As discussed with you, the transmittal of the above findings would require rather lengthy documents and be a very real problem for us in protecting our trade secrets, as we have no assurance that this proprietary information could be protected with the existence of the Freedom of Information Act. We have, therefore, concluded that Whittaker will agree to forward drawings as requested in those cases where it is a straightforward situation, and will inform the FAA where a problem such as the above exists so that the FAA can visit Whittaker to complete its determination.

A second issue was discussed concerning the applicability of a statement made in reference (a) that "In those cases where a determination cannot be made by review of these engineering orders, the engineering approval will be withheld pending a satisfactory test by the applicant." The problem here is the implication that Whittaker will not be consulted in deciding what engineering tests Execuair must perform for approval. We have gone on record that a qualification test for the valve assembly is the proper justification for adequacy; however, there may be exceptions to this for certain parts. However, as Execuair has no access to the original manufacturer's design specifications, I do not see how an adequate determination of testing requirements can be made without consultation with Whittaker, or engineers at Pratt & Whitney or Boeing.

It is my understanding that you agree that Whittaker engineering should be involved in any such decision.

Please do not hesitate to contact me if there are questions about any of these items.

Very truly yours,

Joseph W. Stevens
President

hb

10 of 26

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765-8160

February 20, 1980

Whittaker
Aircraft Engineering Div.
Rec'd: 100/140/180
MAR 4 1980
Control 2640-80
Date Ans. 7/23/81
File Code: 8123 Whittaker controls PMA

Federal Aviation Administration
Western Region
P. O. Box 92007, World Way Postal Center
Los Angeles, California 90009

Attention: Mr. F. J. Karnowski, Acting Chief
Aircraft Engineering Division

Subject: Airworthiness Requirements - PMA Parts

Reference:
- a) FAR 21-303 (c) and (d) (1)
- b) FAA letter to Execuair dated May 14, 1979 establishing test requirements for P/N E-129408
- c) FAA letter to Execuair dated May 31, 1979 approving test plan
- d) AWE-140:HWF:8123 Execuair PMA

Note: This correspondence (with enclosures) is considered exempt from disclosure under the Freedom of Information Act

Gentlemen:

The FAA letter of reference (b) has been obtained by Whittaker Controls under the provision of the Freedom of Information Act. Contained in this letter to Execuair are the tests considered by the FAA as necessary to qualify Execuair P/N E-129408, body assembly, as an airworthy PMA part replacement for Whittaker's P/N 129408 in our P/N 129525, anti-ice valve assembly.

This "qualification" test consists entirely of a structural proof pressure test at

The test schedule refers to the fact that this test shall be conducted "on a P/N 129525 Whittaker valve assembly."

While various Whittaker personnel have been led to believe that this test requirement has been revised, documentation supplied on October 30, 1979 under the FOIA covers the period ending July 31, 1979 without mention of any revision.

We believe that absolute "identicality" is a legitimate basis for qualification, but that the only acceptable alternative should be a full qualification test, to the original specification, with the component in question installed under FAA supervision as the solitary replacement part in an original manufacturer's product.

11 of 26

Whittaker Controls wishes to express its firm belief that this FAA Engineering decision circumvents the orderly conservative process by which only properly "qualified" parts are placed in service on this nation's airlines.

No other test criteria can adequately prove that any single component can function as a replacement part. The purpose of such qualification should not be to verify that an alternate supplier's product functions in and of itself, but that its components can be safely interchanged in the field with those of the original supplier and that this individual component will function at least as well as the original component.

In the particular instance noted in reference (b), the P/N E-129408 has been observed to be "not identical" to Whittaker's qualified part, number 129408. However, FAA Engineering judgment has been applied based on visual examination of the components of this sub-assembly, and it appears that a decision has been made to the effect that this replacement "ought to be as strong" or "ought to be as functional" because it appears to be at least as "solid" as the original part.

Literally hundreds of hours of intensive Engineering effort at Whittaker were devoted to the design and development of our body assembly, P/N Since this valve operated on the JT8D engine, in an environment of high temperature and high vibration, exhaustive vibration tests at elevated temperatures were conducted. In fact, four distinct body designs have been employed for this application; the body having been superseded in January 1963 by P/N which was in turn superseded by P/N in January 1967. During the seventeen years which have elapsed since our retirement of the design, Whittaker Controls evolved the from "A" revision to "K" revision and the from "A" to "H". The initial release of P/N contained no less than eleven (11) changes from the superseded

Whittaker Controls willingly concedes that some of these changes may have been clerical in nature, and that others may have been effected to improve produceability and/or to reduce manufacturing costs; but it is undeniable that at least a portion of these changes were made for the purpose of improving reliability and/or reducing service problems.

Now, the letter of reference (b) permits the qualification of a replacement body almost solely on the basis of its performance as a pressure vessel. Failure modes in this part have never been burst related. Vibration and shock, both physical and thermal, are the key elements in the service life of this unit.

It is of vital importance to note that simple vibration of the body itself is of

12826

absolutely no significance. The critical factor is the

During our qualification of a largely similar valve, P/N for the JT8D-217 engine, planned for service on the Douglas DC9-80 aircraft, Whittaker Controls developed a completely new one-piece cast valve body, P/N This body, on visual examination, could easily be taken to be superior to our current fabricated assembly.

As the enclosed photographs show, no engineer would be likely to vote against the new body as a more serviceable component. An apparently valid assumption could have been made that the body would, since it was capable of higher performance, give superior longevity in the reduced environment of the current valve series.

However, Whittaker Controls, as it has many times in the past, refused the obvious assumption and submitted the new body assembly to the stringent vibration test requirements of the current production specification. The enclosed results of this comparison testing show that the improved body created resonant vibration levels in the production actuator which far exceeded the induced vibration in the same actuator with the production fabricated body. Vibration levels of were recorded, compared to a high of only with the fabricated production body.

We believe that this example points out the danger inherent in the assumption that "stronger is better," that "thick is better than thin," that "stiff is better than flexible." The integrated marriage of components into a functioning assembly is the end result of hundreds of hours of painstaking engineering testing to the specification provided by the user. Consequently, we feel very strongly that a full qualification test program, to the original specification, where the replacement component is discretely tested for its ability to function, surrounded by original components, is the only valid clinical evaluation of the component in question!

Our views on this subject in general and in regard to the valve body specifically have been discussed with Engineering representatives of the Type Certificate Holder, Pratt & Whitney, and they concur with us in this regard, that testing to the specification is the only acceptable laboratory evaluation method, and that the testing described in reference (b) falls far short of this standard.

Naturally, we accept the fact that service to the end user coupled with consistent safety to the public is the final acceptance criteria, and that extended service life tests under controlled conditions can be substituted for the laboratory testing method of evaluation. But, in the absence of either, we feel compelled to protest that neither the intent of the Type Certificate Holder nor the best interests of the end user are being met by the current definition of "acceptability" as exam-

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pled by the requirements of the letter of reference (b).

We urge your earliest attention to this matter so that neither Execuair nor the FAA are required to expend effort and funds in a test which cannot possibly be conclusive.

Whittaker Controls does hereby, under the authority of 5 USC552 (b) (4), advise the FAA that the data enclosed and discussed herein are trade secrets and commercial information which Whittaker Controls considers to be privileged, confidential, and exempt from disclosure under the Freedom of Information Act.

Very truly yours,

WHITTAKER CONTROLS

Bruce L Richards

Bruce L. Richards
Product Manager

BLR:m

Enclosures

14726

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765 6160

Whittaker

February 18, 1980

Department of Transportation
Federal Aviation Administration
P. O. Box 92007, World Way Postal Center
Los Angeles, California 90009

Attention: F. J. Karnowski, Acting Chief
Aircraft Engineering Division

Subject: FAA Request for Whittaker Drawing Information

Reference: Your January 4, 1980 letter to F. Larango
Reference AWE-140:HRIC:8123 PMA

Note: This document is considered to be exempt from disclosure under the requirements of the Freedom of Information Act

Gentlemen:

In recent months, we have held numerous discussions with FAA personnel regarding the criteria to be used to judge the acceptability of data submitted for PMA by identicality. In response to past requests from your agency, we have routinely investigated all requests for documentation verification completely, even when it appeared unlikely that proper identicality could be established. Since the referenced letter clearly indicates a renewed and perhaps even higher level of PMA activity, we believe it would be helpful to reduce our understanding of your requirements to a series of "go" and "no-go" decisions. Your confirmation of our understanding as listed below will enable us to provide your office with all necessary data without the need to expend many hours in research past a "no-go" decision.

1. The applicant's drawings must reflect all the technical and quality control data noted in the current Whittaker engineering drawings. Where the applicant uses an acquired Whittaker drawing, but with his title block, then this comparison can be done simply by reference to the drawing revision. If the applicant's drawing revision is the same as the current Whittaker drawing, then the applicant has a "go" situation, assuming other PMA data requirements are met. 159 26

2. If the drawing revisions are not the same, an evaluation of the drawing changes is required. If Whittaker advanced its drawing revision to include an alternate raw material, or changed a characteristic to facilitate production, the applicant still has a "go" situation. However,

2. should the Whittaker drawing change be the corrective action to a service related technical or quality problem, the applicant has a "no-go" situation.

3. The applicant must have the supporting documents noted on the current Whittaker drawing, and these supporting documents must have the same letter revision as the current Whittaker documents (subject to the rationale noted above). Cases in point are:

   a) Drawings reflecting that

   b) Drawings reflecting

   c) Drawings reflecting

4. The applicant must correctly identify the Whittaker valve assembly drawing number that accepts the part for which he seeks PMA.

5. The applicant must correctly identify the aircraft or engine that was certificated with the Whittaker valve assembly.

6. If the applicant uses an acquired Whittaker drawing with a superimposed title block, the body of the drawing must not reference Whittaker. For instance, if the drawing originally required, "Identify as W.C. Part Number xxx xxx," the applicant's drawing must be altered to delete the W.C. reference.

7. If the drawing reflects an assembly of parts, and the technical and quality requirements of the assembly procedure are not outlined in published service manuals, then the applicant must show objective evidence of understanding of the assembly and quality control tests or inspections

8. The FAA does not intend to grant PMA for the manufacture of parts below the level of Whittaker's saleable assemblies and spare parts. That is, the item in question must be portrayed and identified as a replaceable component in Whittaker's current overhaul manual.

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Further to the above, we understand that the root cause of all "no-go" conditions recommended by Whittaker, and accepted by the FAA, will not be revealed to the applicant.

Finally, we believe that the very criteria noted above represents significant proprietary information, the disclosure of which would be of great commercial benefit to the applicant, at Whittaker's expense. This correspondence is, therefore, deemed by Whittaker to be exempt from disclosure under the Freedom of Information Act and subject to the protection provided by Section 1104 of the Federal Aviation Act.

Your early confirmation of these ground rules will enable us to expedite processing of your referenced request for information.

Very truly yours,

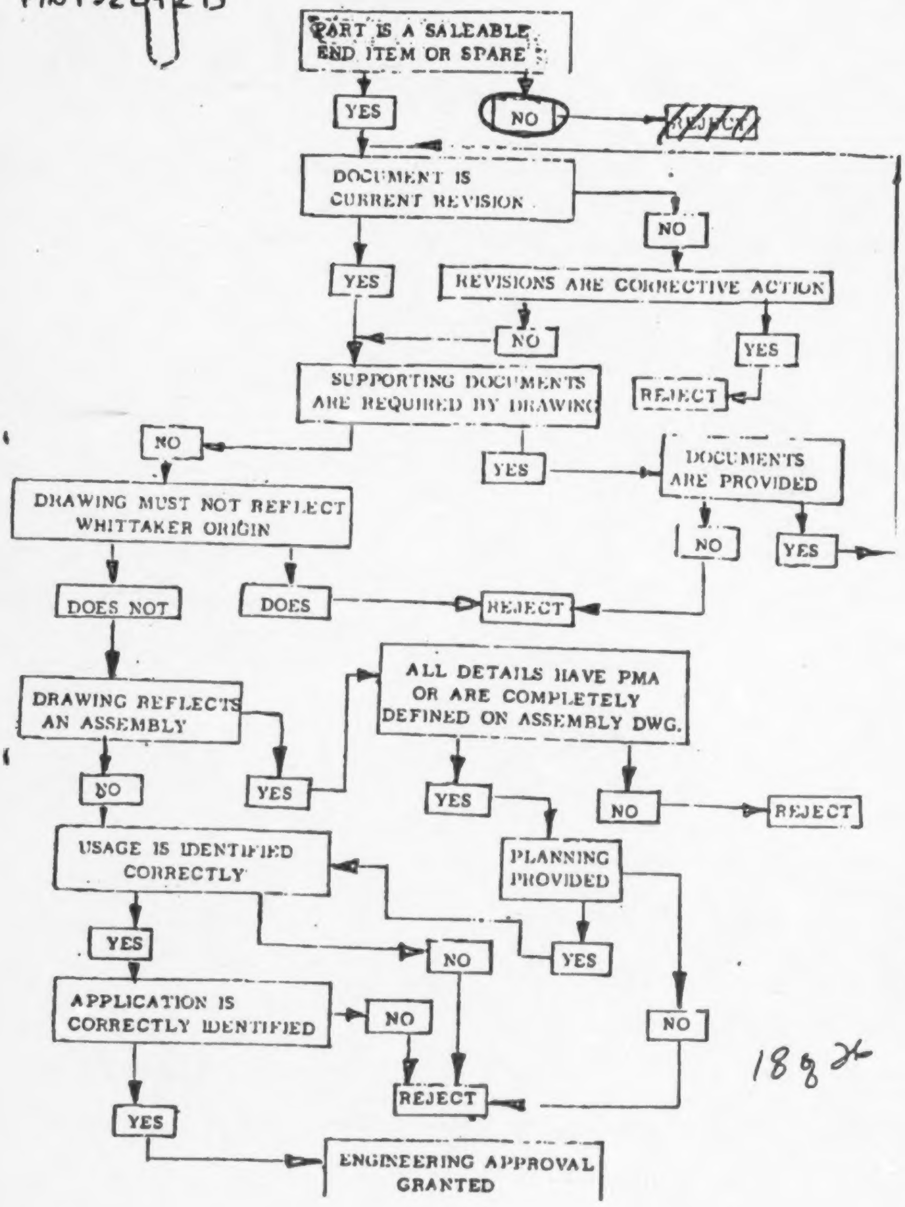
WHITTAKER CONTROLS

Bruce L. Richards
Bruce L. Richards
Product Manager

BLR:m

17726

P/N 152092D


PART IS A SALEABLE END ITEM OR SPARE
YES
NO
REJECT
DOCUMENT IS CURRENT REVISION
NO
YES
REVISIONS ARE CORRECTIVE ACTION
NO
YES
SUPPORTING DOCUMENTS ARE REQUIRED BY DRAWING
REJECT
NO
YES
DOCUMENTS ARE PROVIDED
DRAWING MUST NOT REFLECT WHITTAKER ORIGIN
NO
YES
DOES NOT
DOES
REJECT
ALL DETAILS HAVE PMA OR ARE COMPLETELY DEFINED ON ASSEMBLY DWG.
DRAWING REFLECTS AN ASSEMBLY
NO
YES
YES
NO
REJECT
USAGE IS IDENTIFIED CORRECTLY
PLANNING PROVIDED
YES
NO
YES
APPLICATION IS CORRECTLY IDENTIFIED
NO
NO
REJECT
YES
ENGINEERING APPROVAL GRANTED

18 of 26

JAN 4 1980

file:

In Reply
Refer to: AWE-140:HRIC:8123 PMA

Whittaker Controls
12838 Saticoy Street
North Hollywood, California 91605

Attention: Mr. F. Larango, Vice President
Quality Assurance

Subject : Request for Whittaker Controls Valve Detail Drawings

Gentlemen:

[illegible]s office has need of a number of the subject drawings for the purpose of establishing identicality of applicant's drawings pursuant to issuance of a Parts Manufacturing Approval for Whittaker Valve replacement parts.

The specific drawings required are listed below together with the applicable valve assembly:

Part Number	Part Name	Valve Assembly
134217 N/C	Plate	136555
151769 N/C	Bar Clutch	150055, 150095, 151395
152060 X_2	Lever	150055, 150095, 151395
105567 N/C	Gear Assy.	150055, 150095, 161395
105570 N/C	Cover Assy.	150055, 150095, 151395
151992 X_2	Plate	150055, 150095, 161395
131228-1 F	Sump. Assy.	136555-1
134219-1 F	Sump. Assy.	136565-1
[illegible]89 A	Rotor	146905
105522 F	Shaft	124645, 129485
150229 A	Connector	124645, 129485
22995 K	Plunger	146918
153448 N/C	Gear Spur	137005
140917 N/C	Shaft	141005, 141015
123857 B	Lever	130555, 120825-1, 123605-1
130550 N/C	Follower	130555, 120825-1, 123605-1
130549 N/C	Roller	130655, 120825-1, 123605-1
WE 459-11/403 H	Body	130345, 130345-1
WA 760-3 E	Shaft	130345, 130345-1
WE 459-11/434 B	Shaft	130345, 130345-1
150420 B	Spacer	129475, 129525
151072 E	Shaft	129475, 129525
152137 B	Retainer	129475, 129525
152072 F	Gear	129475, 129525
152092 D	Cage	129475, 129525
141040 N/C	Washer Thrust	141005, 141015

AA Form 1360-14 (7-67)

CONCURRENCES

RTG. SYMBOL	AWE-4C
INITIALS/SIG.	HRR NF
DATE	1/4/79
RTG. SYMBOL	
INITIALS/SIG.	ERC
DATE	1/4/80

19826

It is recognized that in some cases the drawing revision letter listed may have been superceded so a submittal of the engineering orders should be included to reconcile any differences from current production parts.

In those cases where a determination cannot be made by review of these engineering orders, the engineering approval will be withheld pending a satisfactory test by the applicant.

We trust you will comply with this request at your earliest convenience.

Sincerely,

Original Signed By
C. C. RISNER

F. J. KARNOWSKI
Acting Chief, Aircraft Engineering Division

cc: AWE-180
AWE-130

AWE-140:KULEWICZ:x6381:12/27/79:WPC/mje/bea:AE81RA31
Rev:1/4/80:lmk

20 of 26

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765-8160

Whittaker

March 24, 1978

Aircraft Engineering Br.
Rec'd: AWE 104
MAR 27 78
Control 78-2007
Due Ans. [illegible]
File Code

file: 8123

Department of Transportation
Federal Aviation Administration
Western Region
P.O. Box 92007, World Way Postal Center
Los Angeles, CA 90069

Attention: Mr. Hank Kulewicz, Aerospace Engineer

Subject: Execuair Request for PMA Approval (with respect to specific part numbers specifically designed, developed, qualified and manufactured by Whittaker Controls/Dynasciences Corporation as entities of the Whittaker Corporation)

Reference: DOT/FAA letter of 12-9-77, Robert H. Stanton to John Calfas (ref. AWE-104:1210-1)

Attachments:

(a) Whittaker Controls Document 75-02-2 dated 3-15-77, Overhaul Manual with Illustrated Parts List for Whittaker Part Number 229165, Motor Actuated Butterfly Shutoff Valve

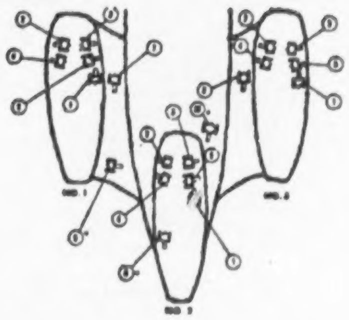
Gentlemen:

This letter is written in response to our recent telephone conversation concerning additional information relative to specific components and/or subassemblies which are utilized in Whittaker anti-icing valves in service on JT-8D engines as engine mounted anti-icing valves
Whittaker P/N 128775; Whittaker P/N 129475;
Whittaker P/N 229163; Whittaker P/N 320115).
These same type units, under the identical part number or other part numbers due to minor configuration changes, are also utilized on the McDonnell Douglas DC-9 Whittaker P/N 129525) and by the Boeing Company on 727 and 737 aircraft Whittaker P/N 128775; Whittaker P/N 129525; Whittaker P/N 229165; Whittaker P/N 320115). These aircraft types, i.e., Boeing 727/737 and McDonnell DC-9, are in service throughout the world on FAA certified commercial aircraft and on private and/or business jets.

The end usage applications of this specific equipment on the aforementioned aircraft are as depicted below:

21 of 26

Mr. Hank Kulewicz
March 24, 1978
Page 2



VALVE FUNCTION AND LOCATION

① FUEL DEICE
② LEFT INLET VANE ANTI-ICE
③ RIGHT INLET VANE ANTI-ICE
④ NOSE COWL THERMAL ANTI-ICE

Installed in JT-8D engine equipment.

⑤ CSD OIL COOLER EJECTOR
*⑥ EMPENNAGE THERMAL BY-PASS ANTI-ICE
⑦ LEFT THERMAL HEAT EXCHANGER
⑧ RIGHT THERMAL HEAT EXCHANGER
*⑨ NO. 1 ENGINE HYDRAULIC EJECTOR
*⑩ NO. 2 ENGINE HYDRAULIC EJECTOR

— 727, 737, DC-9 applications installed in nacelles and/or on airframe.

* (NOT ON ALL AIRCRAFT)

Whittaker Controls is the sole approved source for the above units in the applications shown as a result of extensive design, development, qualification, production engineering, inspection, quality assurance, and manufacturing efforts assiduously conducted by Whittaker Controls over the past 20 years.

The basic engineering documents required for the production of aircraft equipment consists of the following:

1. An engineering parts list which establishes a complete breakdown of all material required to produce the end assembly. This document establishes the engineering definition of the final unit from the lowest level of detail component/casting up through the various subassemblies to the complete final assembly.

2. Detailed engineering drawings in accordance with MIL-STD 100 as controlled by MIL-STD 1000 and in accordance with the engineering and drafting standards and procedures established by the company as approved by the OEM (prime manufacturers). Specific drawings must be prepared for all details, subassemblies, and the final assembly.

22 7 26

3. A specific final assembly/test procedure and supporting data sheets must be prepared and coordinated with production and quality assurance personnel to give assurance that each serialized end assembly is tested to meet the requirements of the application as set forth by the customer specification and as verified by the engineering design, development and qualification programs.

Assuming that all of the above definitive engineering data, as maintained in an updated condition, were made available to an alternate manufacturing entity (which is, in fact, not possible as no rights in data belong to anyone outside the Whittaker Corporation), it is possible that a cursory evaluation of these data by an individual unfamiliar with total manufacturing operations may determine that these data alone would provide all of the information required to successfully produce the parts, subassemblies and the final assembly to the engineering requirements. Obviously, these complete updated engineering data are only available at the approved design and manufacturing facility. Even if such data were available, it would be essential to have a substantial quantity of supporting information which is proprietary with our company and which is required through manufacturing, assembly, and testing to insure that the detail parts, subassemblies and final assemblies do, in fact, meet the requirements of the engineering drawings and/or specifications. This ancillary information consists of, but is not necessarily limited to, the items as follows:

✓ 1. Whittaker SPS (Standard Process Specification)

These documents, generated and maintained by our engineering department, establish exacting criteria for all types of processes utilized on both details, subassemblies, and final assemblies such as impregnation, epoxy bonding, chrome plating, heat treatment, electroless nickel plating, etc. Certain of these documents have their basis in MIL-STD specifications which cover certain generic processes, and the Whittaker documents represent specific resolution of an exact process deemed essential for the component/subassembly/final assembly as determined through development and qualification. Certain other processes are not covered by MIL-STD or other known applicable specifications and are proprietary in their applications at Whittaker Controls.

2. Specification Controlled Drawings

Certain critical components, such as motor brushes, bearings, electrical connectors, electrical switches, commutators, diodes, etc. are selected by engineering and are source controlled to assure the same degree of reliability for all production and spare parts. This information is on the drawings, and unless controlled through purchasing/manufacturing/quality control, could result in downgrading valve performances through substitution of items of this nature which are physically and dimensionally interchangeable, but of inferior quality.

23 9 26

3. Operation Sheets

Production Engineering/Planning establish operation sheets for all detail components, subassemblies, and final assemblies to establish the proper sequence of manufacturing operations and processes to insure that the end result will meet the engineering drawing requirements. Additionally, special tooling, check fixtures, subassemblies, and assembly fixtures and testing tooling are developed and manufactured to assure conformity to the engineering drawings. This information is incorporated into the respective operation sheets and coordinated with quality control for the required "in-process" and final inspections.

4. IRF (Inspection Recrods File)

These documents are developed and maintained by the quality control organization and delineate the critical dimension parameters for each detail, subassembly, and final assembly. Similar data is maintained for raw castings to establish quality standards which reject those castings which, if machined, would not meet the requirements of the engineering drawings. It is axiomatic that no amount of inspection will improve the quality of a defective component. Quality is essentially a function of the producibility of the design as implemented by the manufacturing capability.

We have been advised by the referenced letter directed to our legal representative that the Execuair Corporation, located in Chatsworth, California, has solicited PMA approval for certain components which are required by the end users (i.e. airlines) or by FAA approved overhaul facilities for the repair and overhaul of this specific equipment.

It is to be noted that the documents prepared and furnished to the end users by Whittaker Controls and/or the prime contractor for the aircraft are NOT INTENDED TO PROVIDE MANUFACTURING DATA FOR THE MANUFACTURE OF PARTS for the respective end assemblies depicted therein, but are prepared solely for the purpose of providing sufficient technical information to enable qualified mechanics to DISASSEMBLE, OVERHAUL, REASSEMBLE, AND TEST the units utilizing factory furnished PMA approved parts as required. This document does not provide any data for components or subassemblies below the level of the recommended lowest replacement assembly and provides that dimensional data only relative to fits and clearances required in the overhaul and reassembly of the units. A typical example of this document is attached (Whittaker Controls Document 75-09-2 dated 3-15-77, Overhaul Manual with Illustrated Parts List for Whittaker Part Number 229165, Motor Actuated Butterfly Shutoff Valve).

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Listed below are certain components for which additional information was requested relative to specifics not incorporated or revealed by the engineering drawings, but which are performed and required by the approved manufacturer to insure that the finished product meets the requirements of the engineering drawings. These data are as follows:

Item #	Part No.	Description
1.	155009	Baseplate ✓

Comments:

a. The from which this component is machined requires The processing is defined by Whittaker Controls internal processing sheets.

b. Castings are per a Whittaker Controls internal document prepared by engineering. This document, defines a specialized not normally used on

c. Special criteria for on this part are currently being developed by Whittaker Controls and the Boeing Company in Seattle, and when finalized will be definitized on a Whittaker Controls inspection document.

2. 154370 Brush Plate

Comments:

a. The on this assembly, Whittaker Controls Part Numbers require tests on each lot to insure This test is defined on an internal Whittaker Controls inspection document.

b. The Whittaker Controls Part Numbers require special fixtures and instructions for These are established in special Whittaker Controls inspection documents.

3. 155002 Motor Mounting Plate

Comments:

a. After parts are cleaned, are required by personnel handling the motor mounting plate. This is to prevent This information is defined by Whittaker Controls

b. standards used by inspectors to that are not described in any government or industry standard are defined by Whittaker Controls internal inspection documents.

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Item # Part No. Description
4. 155530 Gear Assembly

Comments:
deformation controlled by defined by Whittaker Controls internal inspection record file.

5. 155872 Planetary Gear Assembly

Comments:
The following items are established and controlled by internal Whittaker Controls assembly operation sheets:

a. deformation controlled by

b. protrusion is controlled

c. Inspection of

6. 154800 Coil Assembly Armature

Comments:
through as established by engineering and controlled

7. 126372 Seal Assembly

Comments:
Tooling controls the manufacture seal assembly. All of the manufacturing data for the components and assembly operations of this part are established by Whittaker Controls internal operation sheets.

8. 221408 Fab Body

Comments:

a. controlled procedure, is established by engineering and

b. is controlled by internal operation sheets.

I trust the information supplied by this letter will give you sufficient background data to assist in your evaluation. If I can be of further assistance, please advise.

Very truly yours,

Joe Stevens

Joseph W. Stevens, President

26 of 26

GCD:hb

Whittaker

General Aviation
Manufacturers Association

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Washington, D. C. 20036
(202) 296-6540

July 29, 1982

The Honorable Andrew P. Ireland
Chairman
United States House of Representatives
Committee on Small Business
Subcommittee on Export Opportunities
  and Special Small Business Problems
B-363 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

This letter sets forth the views of the General Aviation Manufacturers Association (GAMA) with respect to the FAA's proposed rule changes concerning Parts Manufacturer Approval (PMA), the subject of hearings by the Subcommittee on Export Opportunities and Special Small Business Problems. It is requested that these views be included in the record of this hearing.

GAMA is a trade association representing 35 manufacturers of airplanes, airplane engines, accessories, avionics, and parts. Some of our members, particularly the airframe and engine members, can be classified as original equipment manufacturers and some other members, particularly the accessory and parts manufacturers, are holders of PMAs. A number of our members produce avionics and other equipment under Technical Standard Order Authority, an overall delegation of authority very similar to the PMA except that FAA calls for detailed design standards.

GAMA members have long supported revisions to FAA's rules for PMA as being unnecessarily cumbersome in some areas, too lax in others, and far too subject to local or regional interpretation and application. We have complained about everything from the lack of a standard form to apply for a PMA to the manner in which some FAA personnel handle the issue of "identicality". Copies of past position papers on the subject of PMAs are attached for your consideration and use. These papers date back to the FAA 1974 Airworthiness Review. Our comments to the FAA docket are summarized in the following commentary.

The basic theme expressed by GAMA since its inception in 1970 is that everyone must adhere to the same rules. If it is deemed necessary for safety for one class of manufacturer to conform to a certain standard, then it is incumbent upon all to similarly conform unless the group or individual can show that it is in the public interest to be exempt from the regulation. We further expressed the view that we have proprietary rights that FAA considers in its review of our data and that FAA must then protect.

The underlying issue at the hearing on July 27, 1982, was the continued viability of some PMA manufacturers and distributors if FAA adopts the rules proposed in NPRM 77-19C. GAMA looks at FAA's effort as being quite relaxing in nature in that it will be easier for a PMA applicant to prove identicality to any approved design by simply listing the specific OEM drawing he is copying. Under the present rules, the PMA applicant could only receive the PMA if the design he submits meets the latest design of the OEM. GAMA supports this relaxation.

Another major contention, made by certain government (SBA) and industry witnesses, that present inventories of parts would be made worthless, reflects a misunderstanding of FAA rules and long standing FAA and industry practices. If subsequent changes in rules would affect inventory and current production, no manufacturer (OEM, PMA, TSOA) or supplier could afford to stay in business. The procedures under which the FAA, operators of aircraft and all classes of manufacturers operate are long standing and simple -- one, the rules in effect on the day you apply for a certificate are those that you must meet; and two, unless a defect or problem comes to the attention of the FAA and an airworthiness directive is issued, the product or part may continue to be produced and used.

Though the issue of proprietary rights has been mentioned, testimony has pointed out that there can be nothing proprietary, for instance, in a bearing that both the OEM and the PMA bought from the same vendor. One should consider, however, that the aircraft or engine manufacturer is an assembler or packager of parts, some made or finished by him and many made by others. The key point is that the aircraft or engine manufacturer is the designer who conceived the particular combination that becomes the product and builds or buys the exact combination of parts that is then assembled as the product. The assembler remains responsible for the product, as FAA defines responsible, for the life of that product. For example, it was the aircraft manufacturer who, under Part 21.99(a) of the FAA regulations, determined what was necessary to "fix" an aircraft that developed a wing spar crack after more than twenty years of service (and that had been out of production for more than twenty years) and submitted to FAA, for distribution to all operators, the necessary design changes. Proprietary rights encompasses proprietary obligations.

This continuing obligation for a product and the high initial costs of design and certification must be reflected as add on costs to the actual costs of the parts that go into the product. If these costs cannot be retrieved, then we can no longer develop new products.

The concept of certification of aircraft and component parts thereof is based on the notion that we will require reasonable knowledge of the inherent qualities of the product before we allow it to be sold to the public. This concept, first embodied in the 1926 Air Commerce Act and now the cornerstone of the Federal Aviation Act of 1958, is very similar to our laws requiring tests of drugs and medicines before general sale to the public. Our patent and trademark laws protect the economic rights of the developer of a drug, protection which is not available to the aircraft or engine manufacturers. However, the generic drug producers who compete with the drug developer are also subject to detailed testing to ensure that the generic drug is, in fact, identical. A mere textual explanation (drawing) or declaration that it is the same chemical compound does not suffice. Likewise, two parts, made by different vendors to the same drawing, may or may not be identical. The OEM was required by the rules to demonstrate that the part functioned properly within the product. The generic parts producer should do the same. A more thorough explanation of our position on identicality is contained in the copy of our submittal at the 1974 Airworthiness Review. Our views on product marking are also attached.

Your consideration of our comments is appreciated.

Sincerely,

Edward Stimpson

Edward W. Stimpson
President

Attachments

**General Aviation
Manufacturers Association**

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Washington, D. C. 20036
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15 April 1981

Federal Aviation Administration
Office of the Chief Counsel
Attn: Rules Docket (AGC-204)
Docket No. 17147; Notice 77-19C
800 Independence Avenue, S. W.
Washington, D. C. 20591

Subject : FAA NPRM 77-19C, Parts Manufacturer Approvals;
Falsification of Airworthiness Certification Documents.

Gentlemen:

The General Aviation Manufacturers Association (GAMA) has reviewed the FAA's proposed revisions contained in NPRM 77-19c, and is pleased to submit our comments on the subject.

Just what is meant by identicality and who is responsible for the parts involved? On one side is a constituency that favors issuance only to to the manufacturers who hold undisputed design rights to a part and insists that comparable design requirements be imposed with little or no permissiveness as proposed in 21.302(a)(3)(ii). On the other side of the coin are the "free thinkers" who, for reasons of their own, wish to obtain approval on an identicality basis via a "statement".

We appreciate FAA's dilemna, particularly as one underlying reason for the latest proposals is excessive work load. We are somewhat in a dilemna as well, as we believe the "free American spirit" still exists in industry, and that perhaps a way should be found to make parts available, particularly, items such as plugs, magnetos, seals, tires and a host of other conventional replacement items. The fear is that corners will be cut and that identicality will be abused. The envelope needed is not easy encompass in precise regulatory fashion. Obviously, it must center on true identicality wherein "fit, form and function" prevail, as well as related engineering and environmental limits such that the part in question positively is designed and tested over and above the requirements originally applied. Clear identification of the origin of manufacture is also needed. These aspects must be such as to provide government and user with confidence that the part is airworthy.

There is a third constituency that holds the view there is no such thing as true identicality -- in part because of the use of substitute items in the design and manufacturing of such parts. What to do then? The views outlined in the preceding paragraph could perhaps be directed to developing a proposal on an "equivalency" basis. We believe any such thinking, if adopted, would need a new Notice or perhaps public discussion.

There is a fourth aspect, which GAMA is not prepared to advocate herein, but which may well fit the grand scheme of things to come -- increased delegation of FAA's certification programs.

GAMA has a number of detailed comments on NPRM 77-19C which are set forth in an attachment hereto. Some of these represent clarifications. Others support the views expressed above. We might say in summary that if FAA issues this NPRM, careful attention must be paid by FAA, in the Preamble, to logically setting forth justification statements that speak to the disposition of comments received.

As a final observation we suggest that if adoption proceeds, FAA might well indicate in the Preamble of the adopted rules that every effort has been made to speak logically and in a reasoned manner to the various comments submitted, that FAA intends to evaluate how well things are going in this respect within two years, and that, if adverse findings are noted, a public hearing would be scheduled to clear up noted problem areas.

Thank you for the opportunity to comment on this NPRM.

Sincerely yours,

Stanley J. Green

Stanley J. Green
Vice President

Attachment: a/s

ATTACHMENT - GAMA Docket Submittal
on NPRM 77-19C

GAMA's comments on specific parts of the subject NPRM are as follows:

Item 1, 21.2(b)

This proposal can be interpreted to mean that a fraudulent statement is grounds for ". . . revocation of any or all FAA certificates or approvals issued under Part 21 to any person (company) involved in the falsification". This proposed rule could cause a company that manufactures a diverse line of parts and subassemblies to jeopardize prior FAA certificates or approvals of several different products for an infraction in any one product line, even though distinctly separate organizations within the company administers each product line.

Item 3, 21.301(c)(2)

This paragraph permits the applicant to submit a statement certifying that the fabrication inspection system required by 21.303(c) has been established. It is recommended, for obvious reasons, that the words "and verified by appro-priate FAA personnel" be added to the sentence.

Item 3, 21.301(d)

The following sub-paragraph should be deleted:

> ". . . and must include the names and addresses of all suppliers and facilities at which manufacturing operations are performed on the part and the information required by 21.302 and 21.303."

The control of suppliers is the responsibility of the PMA-TSO holder. The requirement for notification would be burdensome to both the PMA-TSO holder and the FAA. It would make it necessary to notify the FAA of any change in suppliers for reasons of quality, delivery, or economy.

Item 4, 21.302(a)(1)

Clarification of (a)(1) is needed. As worded, the statement can be interpreted to mean : If a part is PMA approved for several applications and subsequently the part is qualified for an additional application, as part of the submittal to the FAA for approval, all previous approvals must be identified.

The proposed change to add a drawing revision requirement implies that part number does not identify a part with a given form fit or function. The configuration of a part is identified by the part number. Drawing number revisions may be made which have no effect on the part itself. Therefore, it may be inappropriate to tie the part number into a drawing number revision.

In addition, to certify a part to a drawing revision suggests that only planes built using that revision would be eligble to incorporate this part. This would suggest also that aircraft serial numbers must be tied in to drawing revisions so that approved part numbers/revisions may be used. It is hoped that this is not what is intended.

Item 4, 21.302(a)(2)(iii)

It is proposed that a new paragraph be added to clarify that, in certain cases, the design of a part must include performance data to be used in functional tests leading to final airworthiness acceptance of each production part. It is recommended that these functional tests be the same as, or directly equivalent to, the tests originally performed by the original equipment manufacturer on the same part.

Item 4, 21.302(a)(3)(i)

This provision permits the applicant to "certify" that the design of a part is identical to an existing approved design "without further data comparison" by the FAA prior to granting the PMA application. The level of "certification" data is nebulous and will lead to different interpretations in each region. This clearly will not afford the same level of protection as is provided by an original equipment part.

It is recommended that specific identicality data be required to include, in addition to static strength requirements, any requirements for endurance and safe life, if appropriate.

Item 4, 21.302(a)(3)(ii)

This permits an applicant to make an "independent showing through analysis and tests, that the replacement part meets the same Federal Aviation Regulations and is equivalent in form, fit, and function to the part to . . ."

A change is recommended to require similar identicality for safe life and/or manufacturing processes as follows:

"is equivalent in form, fit, function, endurance, and safe life, if applicable, to the . . ."

Item 4, 21.302(b)

The FAA Administrator "may" require the manufacturer of "critical" parts and other parts specified in this section of the NPRM "to provide endurance or environmental testing, or both."

It is believed that to assure identicality, the Administrator "must require endurance or environmental testing, or both."

Item 6, 45.15(a)(5)

The proposed marking requirements of 45.15(a)(5) are going to do nothing but create a hassle between the PMA applicant, FAA, and the Type Certificate holder. If a user orders a replacement part from the Type Certificate holder by reference to the part number and drawing revision designation as noted on the part supplied by a PMA holder, the original Type Certificate holder may no longer produce the part according to the drawing revision, having superseded it by one or more later revisions. Confusion can only result among the parts handling personnel.

Additionally, what does the FAA mean by, "as applicable" in the proposed 45.15(a)(5), "For replacement parts, the part number, and, as applicable, the drawing revision designation for which the part is an acceptable replacement"?

**General Aviation
Manufacturers Association**

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(202) 296-8848

December 28, 1977

Federal Aviation Administration
Office of the Chief Counsel
Attn: Rules Docket AGC-24
Docket No. 17147
800 Independence Avenue, S. W.
Washington, D. C. 20591

Subject: Parts Manufacturer Approvals -
Export Airworthiness Approvals
Docket No. 17147; Notice 77-19A

Gentlemen:

The General Aviation Manufacturers Association concurs with the subject Notice with the exception of that part concerning the showing of identicalness under proposed section 21.303(c)(4). Further, we believe that this Notice did not cover many of the problems concerning Parts Manufacturer Approvals that were brought to the attention of the FAA in response to Notice 74-24, on the same subject, and at the December, 1974 Airworthiness Review.

It has always been puzzling as to why FAA requires evidence of a licensing agreement from those applicants who obtain a design by license yet requires no information as to how the design was obtained from any other applicant. Applicants other than licensees need only produce copies of the FAA approved design (which may be propriatary information of the type certificate holder) or other data acceptable to the FAA Region. This proposal would continue to encourage the use of obsolete or illegally obtained data and does not protect the economic rights of the persons who developed the data or those who purchase parts in the belief that the part meets the current production approved design.

Further, identicalness cannot be shown by data alone. Manufacturers who have had to change vendors for parts used in their products have seen, time and time again, that even with all of the latest data and the cooperation of the original equipment manufacturer or type certificate holder, parts are not identical and, in some cases, not usable or safe.

These and other pertinent matters have been brought to the attention of the FAA in reponse to previous NPRM's on the subject of PMA's in 1969 and 1974 but have not been acted upon by FAA. GAMA believes that the FAA should hold a public hearing (a mini review) on all aspects of the rules concerning Parts Manufacturer Approval. This hearing should cover, in depth, all aspects of -

(1) what is necessary to protect the public from unsafe or obsolete parts that do not provide the same degree of safety, function, or life of current production approved parts;

(2) means by which the ultimate purchaser of the part (the airplane owner or operator) can readily know whether the part is an "original equipment" part or one produced by a supplier other than the original equipment certificate holder;

(3) the need for recordation, in the appropriate log books, of the replacement of original equipment parts of a certificated product with other parts;

(4) what data of the certificate holder is considered by FAA to be propriatary under current law, rules and procedures, and what safeguards are taken by FAA to protect against release, either directly or indirectly, of this data;

(5) what design data is in the public domain and how may it be obtained and used by applicants for PMA's;

(6) what rules, procedures and practices apply equally to the certification of parts, by either a PMA applicant or manufacturer of the certificated product; and

(7) what differences exist in the rules, procedures and practices for the certification of parts by PMA applicants and the manufacturer of the certificated product.

The answers to these questions (and others that may arise in the course of a hearing) will provide all manufacturers with the information necessary to compete equally, within the law, in the parts after-market and provide the public with safe products.

Your consideration of these comments is appreciated.

Sincerely,

Stanley J. Green
Vice President

General Aviation
Manufacturers Association

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(202) 296-8848

August 30, 1974

Federal Aviation Administration
Office of the Chief Counsel
Attention: Rules Docket, AGC-24
800 Independence Avenue, S.W.
Washington, D. C. 20591

Dear Sir:

The issue is safety. That which contributes to safety should be retained and that which does not, can be discarded. Therefore, GAMA concurs with the statement in the Preamble that "There appears to be no reason in the interest of safety why a PMA holder should personally have to engage in any of the manufacturing involved in the production of the parts, provided that he assures that all persons performing that manufacturing comply with his fabrication inspection system."

We also concur with the concept that FAA approve all PMA fabrication inspection systems by which the PMA holder assures that all manufacturing involved in the production, including that done by subcontractors, is performed in accordance with the approved system. However, we believe the FAA's determination and surveillance of an adequate test and quality system should be limited to the holders of type certificates or PMAs and not to their subcontractors (unless there is some need to resolve a particular question). Specifically, we feel that the proposal "all PMA holders would also be required to arrange for FAA access to and inspection of all manufacturing facilities upon request by the FAA" is unnecessary and unworkable. The assurance of the proper fabrication inspection systems resulting in a safe product has been (or should have been) established at the time of initial FAA approval. There is no need to have access to all subcontractor facilities if the approved PMA holder's program works and, if it doesn't work, the approval may be withdrawn. In addition, it is often not possible to include, in the application, the names and addresses of all subcontractors.

These proposed requirements could seriously constrain the "make-or-buy" decisions and perogatives of a responsible manufacturer. For example, the original equipment manufacturer may have to change subcontractors for reasons of quality, cost, manufacturing equipment, or labor problems. A vendor may go out of business overnight, or may not be able to meet the schedule requirements, thus necessitating a change. Also, some parts, such as bearings, may be sourced overseas. Many highly competent vendors are non-aerospace commercial machine shops or component manufacturers. They may be lost as sources if they are required to become involved in the paperwork requirements of the FAA which are fully met by the responsible aviation original-equipment manufacturer.

It should be up to the responsible manufacturers to assure adequate specification, test and inspection of purchased material just as they do with respect to the components they manufacture themselves. Control by the FAA of make-or-buy decisions, or FAA inspection of subcontractor plants, could seriously harm or destroy a viable business. We are also concerned as to the additional cost of such FAA activities.

Recommendation:

Accordingly, GAMA recommends that proposed Section 21.303(c)(2) be deleted. We further recommend that proposed Section 21.303(j) be amended to read as follows: "Each holder .... the location of the facility that will perform the approved fabrication inspection."

An accepted Quality Control System is a prerequisite to the issuance of an original FAA-PMA letter as well as to all other persons desiring to release airworthy items into air commerce. The "comparative" method showing that the design of the part meets the applicable airworthiness regulations, allowed under Section 21.303(c)(4), without establishing the capability of the persons seeking such approval, overlooks the lack of substantiating technical knowledge, skills and facilities required of others seeking Type Certification, Supplementary Type Certification or Technical Standard Order authorizations.

The use of the "comparative" method of certification of parts is unique to the issue of PMAs and is found no where else in the FAA rules. In all other methods of certification, substantiating data must be presented. Perhaps this comparative method is acceptable for products and parts that are no longer in production and where the type and design data have been released to FAA and need be made available to any qualified person who can build parts to support aircraft in the fleet. In these cases, the design is frozen and "identical" as used in this rule means just that.

The "comparative" method of certification would also be acceptable for approval of parts manufactured by the supplier to the holder of the type certificate of the product in which the part is installed. In this case, the manufacturer of the certificated product has supplied the necessary design data on the part to the FAA along with the other data necessary to obtain type approval for the product. The supplier to the holder of the type certificate could readily show that his part is "identical" to that installed in the certificated product and could supply supporting evidence from the holder of the type certificate that the necessary design data has been supplied to FAA.

However, this "comparative" method is not appropriate for items in current production which are subject to the dynamics of normal production life (new materials, new methods, engineering changes, improved service life, etc.). It is a practical impossibility for a PMA holder lacking all the supporting technical skills, personnel and facilities to stay abreast and be knowledgeable of all of these factors. To permit substantiation on the grounds that a drawing is identical to one that is part of the type certificate data is a step backward in air safety.

Recommendation:

Accordingly, GAMA recommends that paragraph 21.303 (c)(4) be revised by inserting a period after the word "installed" in the first sentence, by deleting the remainder of this sentence, by deleting the last sentence and by inserting the following:

"The test reports and computations required by this paragraph are not required if the applicant shows that the part is identical to the design of a part that is covered under a type certificate of a product and when—

(i) The type certificated product is no longer in production and the type certificate data has been given to the FAA for release to the public;

(ii) The applicant furnishes evidence that he has obtained the design and other pertinent manufacturing information persuant to a licensing agreement with the holder of the type certificate; or

(iii) The manufacturer of the part is the supplier of that part to the holder of the type certificate of the product in which the part is installed and furnishes supporting evidence from the holder of the type certificate that the necessary design data has been furnished to the FAA.

The production of parts by a PMA in many respects is similar to the operations conducted under Part 21, Subpart F--Production under type certificate only. The language of proposed Section 21.303(c) should therefore reflect the privileges and limitations contained in Subpart F, whereever appropriate.

Recommendation:

Accordingly, GAMA recommends the following changes:

Section 21.303(c)(5)(i) be amended by adding the words "or must be suitable equivalents" after the word "data" and before the semicolon. This will conform this section to Section 21.125(b)(1).

Section 21.303(c)(5)(ii) be amended by adding the words "and bought or subcontracted parts" after the word "materials" and before the word "are". This will conform this section to Section 21.125(b)(2).

Proposed Section 21.303(c)(5)(v) permits the use of statistical quality control procedures to be employed where it is shown that a satisfactory level of quality will be maintained. While such a proposal is consistent with current practices of the Department of Defense and the industry, it is not spelled out as a permissible practice in the quality assurance provisions of Subpart G of Part 21 covering Production Certificates. Such procedures are, on occasion, approved as part of the quality assurance program of a particular manufacturer by some FAA regions but, as often, are denied approval for other manufacturers in other regions.

Recommendation:

Provisions for the use of statistical quality control procedures should be incorporated in all other certification requirements covering the manufacture of products and parts in addition to inclusion in these proposed PMA rules.

While it is recognized that this Notice is limited to the specific proposed changes to Part 21.303, it is believed appropriate that the FAA consider, at this time, three additional changes to the regulations affecting parts manufactured under a PMA.

1. Section 45.15 of the Federal Aviation Regulations sets forth the criteria relating to the identification of PMA parts. GAMA believes that Part 21, Subpart K should cross reference these requirements as proper identification of PMA parts is essential to assure differentiation from those produced by the original manufacturer.

2. Many PMA parts are approved as suitable field replacements for parts that were originally incorporated into certificated products. At the same time, such PMA parts are not acceptable for use by the holder of the original certificate as the PMA parts were not qualified in the original product in accordance with the regulations governing the original certificate holder. For example, a PMA part could be used as a field replacement on a certificated engine, but the holder of the original Type Certificate would not be in a position to use it because the part had not been qualified under his Type Certificate as an airworthy part.

   When such a PMA part is used as a field replacement, the originally certificated product has, in effect, been modified. We believe that proper documentation of such modification should be required by the completion of a Form 337 (or similar form) which should be filed with the FAA and an appropriate notation of the change made in the log book. In the case of consumable items such as spark plugs and oil filters, a log book entry, identifying the replacement part, would be adequate.

3. PMA manufacturers should be required to identify their parts with letters and/or numerals which are completely different from those used by the person securing the original certification.

The incorporation into the FAR's of these recommendations would clarify the regulations and assure that the appropriate information is available to the using public. The absence of such information today may cause or is causing an adverse affect on safety and the economic well being of the original manufacturer, the PMA holder, the manufacturer of parts and components, and of distributors, dealers, fixed base operators, and end users.

Timely and complete knowledge by the owner or operator of an aircraft of all airworthiness directives that affect his aircraft is essential. Without the suggested identification requirements, proper action is questionable.

For example, assume a PMA part is put into an engine. Unless the owner or operator had knowledge of this from the invoice from the repair station, he would be unaware of this change to his engine. If, at a later date, an Airworthiness Directive (AD) is issued against the PMA part, the possibility of the owner/operator knowing he was subject to the AD would be practically non-existent. The FAA would have to require all of the originally certificated product users to comply with the AD in the hopes of purging the field of the suspect parts.

On the other hand, if our suggestions were adopted and a Form 337 were completed and inserted in the log book, the necessary information as to what specific part was installed would be readily available to the owner or operator, the repairman, and the repair station. The need to know what part was installed is equally applicable to Service Bulletins and Service Instructions.

Another benefit from the use of the Form 337 is to inform everyone that a certificated product has been modified. For example, the name plate on an engine states the Type Certificate number, the Production Certificate number, and the manufacturer's name. In those instances where a PMA part is used, which has not been qualified by the original manufacturer, some notification of this modification should be made. Such notification is required upon issue of an STC, and we believe it is proper to require it for a PMA part.

While perhaps not a direct concern of the FAA, the identification notification through the Form 337 will give the owner proper information as to whose parts are being utilized in overhauling or repairing his aircraft, engine, propeller or appliance. In today's jargon, it could be called "truth in overhauling", in that repair shops would thereby put the owner on notice as to the source of parts being used if they are not those of the original certificate holder. It could also prevent misrepresentation in those instances where part source is of particular concern to an owner or operator.

The recommendation that PMA parts be identified by numerals and/or letters different from those of the original manufacturer is a further extension of this concept of proper identification. It will better ensure that parts produced by the Original Equipment Manufacturer and the PMA are clearly distinguishable. The possibility of the distinguishing prefix, required by the present rules, being obliterated by use is very real. As the PMA holder is following the original certificate holder, it is proper that the burden of distinguishment be on the PMA.

GAMA appreciates the opportunity to comment on this NPRM and respectfully requests that our additional proposals be considered.

Sincerely,

Stanley J. Green

Stanley J. Green
Vice President

SJG/mkr

**General Aviation
Manufacturers Association**

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Position Paper Presented by
General Aviation Manufacturers Association
at the FAA 1974 Airworthiness Review Conference
December 3-4, 1974

Committee 1, Procedures and Special Issues
Additional Justification and Counter Proposal
Parts Manufacturers Approval

An accepted Quality Control System is a prerequisite to the issuance of an original FAA-PMA letter, as well as to all other persons desiring to release airworthy items into air commerce. The "comparative" method for showing that the design of the part meets the applicable airworthiness regulations, allowed under Section 21.303(c)(4), without establishing the capability of the persons seeking such approval, overlooks the lace of substantiating technical knowledge, skills and facilities required of others seeking Type Certification, Supplementary Type Certification or Technical Standard Order authorizations.

The use of the "comparative" method of certification of parts is unique to the issue of PMA's and is found no where else in the FAA rules. In all other methods of certification, substantiating data must be presented. Perhaps this comparative method is acceptable for products and parts that are no longer in production and where the type and design data have been released to FAA and need be made available to any qualified person who can build parts to support aircraft in the fleet. In these cases, the design is frozen and "identical", as used in this rule, means just that.

The "comparative" method of certification would also be acceptable for approval of parts manufactured by the supplier to the holder of the type certificate of the product in which the part is installed. In this case, the manufacturer of the certificated product has supplied the necessary design data on the part, to the FAA, along with the other data necessary to obtain type approval for the product. The supplier to the holder of the type certificate could readily show that his part is "identical" to that installed in the certificated product and could supply supporting evidence from the holder of the type certificate that the necessary design data has been supplied to FAA.

However, this "comparative" method is not appropriate for items in current production which are subject to the dynamics of normal production life (new materials, new methods, engineering changes, improved service life, etc.). It is a practical impossibility for a PMA holder lacking all the supporting technical skills, personnel and facilities to stay abreast and be knowledgeable of all of these factors. To permit substantiation on the grounds that a drawing is identical to one that is part of the type certificate data is a step backward in air safety.

Accordingly, GAMA recommends that paragraph 21.303(c)(4) be revised by inserting a period after the word "installed" in the first sentence, by deleting the remainder of this sentence, by deleting the last sentence and by inserting the following:

"The test reports and computations required by this paragraph are not required if the applicant shows that the part is identical to the design of a part that is covered under a type certificate of a product when --

(i) The type certificated product is no longer in production and the type certificate data has been given to the FAA for release to the public;

(ii) The applicant furnishes evidence that he has obtained the design and other pertinent manufacturing information pursuant to a licensing agreement with the holder of the type certificate; or

(iii) The manufacturer of the part is the supplier of that part to the holder of the type certificate of the product in which the part is installed and furnishes supporting evidence from the holder of the type certificate that the necessary design data has been furnished to the FAA."

Section 45.15 of the Federal Aviation Regulations sets forth the criteria relating to the identification of PMA parts. GAMA believes that Part 21, Subpart K should cross reference these requirements as proper identification of PMA parts is essential to assure differentiation from those produced by the original manufacturer.

Many PMA parts are approved as suitable field replacements for parts that were originally incorporated into certificated products. At the same time, such PMA parts are not acceptable for use by the holder of the original certificate as the PMA parts were not qualified in the original product in accordance with the regulations governing the original certificate holder. For example, a PMA part could be used as a field replacement on a certificated engine, but the holder of the original Type Certificate would not be in a position to use it because the part has not been qualified under his Type Certificate as an airworthy part.

When such a PMA part is used as a field replacement, the originally certificated product has, in effect, been modified. We believe that proper documentation of such modification should be required by the completion of a Form 337 (or similar form) which should be filed with the FAA and an appropriate notation of the change made in the log book. In the case of consumable items, such as spark plugs and oil filters, a log book entry, identifying the replacement part, would be adequate.

PMA manufacturers should be required to identify their parts with letters and/or numerals that are completely different from those used by the person securing the original certification.

The incorporation into the FAR's of these recommendations would clarify the regulations and assure that the appropriate information is available to the using public. The absence of such information today may cause or is causing an adverse affect on safety and the economic well being of the original manufacturer, the PMA holder, the manufacturer of parts and components, and of distributors, dealers, fixed base operators, and end users.

Timely and complete knowledge by the owner or operator of an aircraft of all airworthiness directives that affect his aircraft is essential. Without the suggested identification requirements, proper action is questionable.

For example, assume a PMA part is put into an engine. Unless the owner or operator had knowledge of this from the invoice from the repair station, he would be unware of this change to his engine. If, at a later date, an Airworthiness Directive (AD) is issued against the PMA part, the possibility of the owner/operator knowing he was subject to the AD would be practically non-existent. The FAA would have to require all of the originally certificated product users to comply with the AD in the hopes of purging the field of the suspect parts.

On the other hand, if our suggestions were adopted and a Form 337 were completed and inserted in the log book, the necessary information as to what specific part was installed would be readily available to the owner or operator, the repairman, and the repair station. The need to know what part was installed is equally applicable to Service Bulletins and Service Instructions.

Another benefit from the use of the Form 337 is to inform everyone that a certificated product has been modified. For example, the name plate on an engine states the Type Certificate number, the Production Certificate number, and the manufacturer's name. In those instances where a PMA part is used, which has not been qualified by the original manufacturer, some notification of this modification should be made. Such notification is required upon issue of an STC, and we believe it is proper to require it for a PMA part.

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General Aviation
Manufacturers Association

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1025 Connecticut Ave., N.W.
Washington, D. C. 20036
(202) 296-8848

May 8, 1973

Mr. James F. Rudolph
Director, Flight Standards
Federal Aviation Administration
800 Independence Avenue, S. W.
Washington, D. C. 20591

Dear Mr. Rudolph:

The General Aviation Manufacturers Association respectfully requests, in accordance with Section 11.25 of Part 11, that Section 15 of Part 45 of the Federal Aviation Regulations be amended. The substance of the amendment is to change that part of Section 45.15 requiring the name and model designation of each type certificated product on which the part is eligible for installation to be either marked on the part, on the container, or on an attached tag, to allow the issuance of bulletins and revised catalogs to indicate the certificated products on which the part is eligible for installation.

The proposed change will provide at least an equivalent level of safety as that provided under the present provisions of Section 45.15. Further, it is believed that the change will improve the level of safety provided under the present Section.

Presently, there is the potential for Section 45.15 to cause an unsafe condition. This could occur for instance, in the particular case of spark plugs, as occasionally application changes occur in such a rapid sequence that it is impossible for the manufacturer to have all the operators, dealers, and wholesalers throughout the world cooperate in a product recall program or in revising the printed container or the application chart contained within the container. In addition, many spark plugs are put on the surplus market by the government and others and for these plugs, there is no direct means to communicate with the current owner. A number of examples of specific problems are as follows:

Example 1 A certain reciprocating engine was originally equipped with a hot spark plug, one already used in many other aircraft engines. Subsequently, an ignition timing revision was made that required a switch to a colder, but also widely used, spark plug. This occurence and its reverse have occurred many different times with different engines and engine manufacturers.

Example 2 An engine manufacturer some years ago changed plug requirements on a certain engine from a 14 mm thread to an 18 mm thread when he strengthed the cylinder head design. No changes were made in the basic engine part number.

Example 3 Many operators have changed older engines from 5/8-24 ignition leads to the better "all-weather" 3/4-20 leads.

Example 4 An engine manufacturer changed his cylinder heads from a short reach plug to a long reach design. The new cylinder could be used interchangeably with the old one on the same engine.

Example 5 A particular igniter was approved for the Pratt-Whitney JT4 engine. A different igniter has been approved in the P/W JT3 engine. Both igniters were virtually identical in appearance, but not in length and were not interchangeable. To benefit the operators, a modification was made on the JT4 engine so that it could use the same igniter as on the JT3 engine.

Example 6 The JT9 engine was originally a dry engine using a particular igniter. Later on, a wet version of the engine was developed under the same basic part number. A new igniter had to be designed specifically for this engine. Although the original igniter could not be used in the wet engine, it continues to be used as the primary igniter in the dry engine, in addition to being used in the JT3 and JT8 engines.

The multitude of these types of changes, with the often large stocking of spark plugs and igniters by operators and dealers throughout the world, makes a recall, for the purpose of revising the data on acceptable engine types, almost completely impractical. A more practical and a much safer way to accomplish the task would be an alternate to the requirements in Section 45.15 to allow the manufacturer, in lieu of including any application data in or on the spark plug container, to periodically issue, and update, bulletins and catalogs listing the current spark plugs and their applications. This would, in effect, force the installer to consult the charts of approved installations.

Page three

Most companies issue bulletins on almost a monthly basis, with annual (or more often) revisions of the whole catalog. All wholesalers, stocking dealers, and all FAA/GADO offices receive the updated technical bulletins and new catalogs.

While only spark plugs and igniters examples have been given, there are similar problems with other product lines. The growing oil filter line shows that identical situations are developing. It is believed that the only way the manufacturer can ensure that the product use is in accord with approved specifications is to provide up to date cataloging, with periodic technical bulletins listing the use of the product. The present system, to mark the container or to attach a tag to the part, is impractical due to the changing needs of the engines, and the large number of items affected.

I have attached, for your review, a draft proposed change that GAMA believes will adequately cover both the safety aspects and the necessities of business. Because this proposal is relieving in nature, you might consider adopting it as a final rule without the issuance of a notice of proposed rule making.

Your consideration of this matter will be most appreciated.

Sincerely,

Stanley J. Green

Stanley J. Green
Vice President

Attachment

General Aviation
Manufacturers Association

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Washington, D. C. 20036
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May 8, 1973

DRAFT REVISION

Revise Section 45.15(b) to read:

If the Administrator finds that a part is too small or that it is otherwise impractical to mark a part with the information required by paragraph (a) of this Section --

(1) A tag, attached to the part or its container must include the information that could not be marked on the part; or

(2) If the Administrator finds that the product on which the part is eligible for use may be changed during the life cycle of the product or part, the part, or tag attached to the part, or the container for the part must have a reference to the manufacturer's catalog or technical bulletin containing information on the certificated products on which the part is eligible, and the manufacturer must show that the catalog or technical bulletin will be updated as necessary.

Attachment, letter to:
Mr. James F. Rudolph, FAA

PROPOSED AGENDA ITEM FOR THE FAA PERIODIC REVIEW, DECEMBER 1974

Submitted by

The General Aviation Manufacturers Association

Part 21 - Approval of Materials, Parts, Processes, and Appliances, Section 21.303, Replacement and modification parts

Statement of the Problem: There is no standard format for making application for an original PMA or an amendment to an existing PMA. As a result, there is a lack of uniformity within FAA as to what should be contained in the application. This can result in numerous attempts being required to submit the proper data to FAA in order to obtain a PMA.

Proposed Regulation Change: It is recommended that FAA develop a standard form to be used for making application for a PMA. This form should be referenced by number in Paragraph 21.303 of Part 21. The form should then be made available to the public.

Justification: The present lack of uniformity in applying for a PMA is creating problems for Industry and FAA. Lack of a standard form leads to lack of uniformity of requirements in the various FAA regions. Insufficient data supplied with PMA applications creates delays in obtaining PMA's and results in the consumption of unnecessary manpower by both Industry and FAA in getting proper data submitted so a PMA can be issued or amended.

FRANCIS L. FILIPOWSKI
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August 11, 1982

Mr. Steve Lynch
United States House of Representatives
Committee on Small Business
Rayburn House Office Building
Room B-363
Washington, D.C. 20515

Re: Small Business - FAA-PMA Hearing August 18, 1982.

Dear Mr. Lynch:

In connection with the FAA hearings being held by the House Subcommittee regarding Export Opportunities and Special Small Business Problems, I submit this letter and a statement for the record. This is pursuant to your invitation to do so.

At this time I ask that my client be permitted to testify as the "Information Paper" before the Subcommittee appears to be extremely one sided in favor of competition without regard to safety and it also contains a great deal of misinformation.

Could you please send me a list of names with addresses, of those parties who were invited to testify. I also ask for copies of any responses.

Please send me a transcript of the hearings.

Thank you for your courtesy and cooperation. I look forward to attending the hearing on August 18th.

Very truly yours,

Francis L. Filipowski

STATEMENT FOR HOUSE SUBCOMMITTEE ON EXPORT OPPORTUNITIES AND SPECIAL SMALL BUSINESS PROBLEMS REGARDING FAA AND REPLACEMENT PARTS FOR AIRCRAFT.
SUBMITTED BY FRANCIS L. FILIPOWSKI, ESQ., ON BEHALF OF AIRCRAFT PARTS CORP.

Aircraft Parts Corp. is a small manufacturer comprised of 80 employees. The Company manufactures aircraft starters, generators, voltage regulators and various repair parts for the United States Air Force, Army, Navy and Coast Guard.The generators are used by Bell Helicopters, Textron of Dallas- Fort Worth, Texas, Hughes Helicopters Division of Summa Corp., Los Angeles, California, Aerospatiale of Grand Prairie, Texas, and many other manufacturers.

Offices are located in the Far East. The Company represents Tracor Inc. of Austin, Texas and works closely with Dynalectron of Fort Worth, Texas and sells for Tracor passive countermeasure equipment for use on USA manufactured fighter aircraft such as the F4, F-5, F15, and other military helicopters.

SY SHERMAN is the founder, owner and president of Aircraft Parts Corp. for these past 20 years. In 1941 after graduation from aircraft school he accepted an appointment to work for the United States Air Forces at Presque Isle, Maine Air Force Depot, as an electrical technician. Presque Isle, Maine, was the jump off spot for heavy and light bombers destined for Europe in World War II. Mr. Sherman was advanced to foreman of the Electrical Department and supervised repair of over 2000 aircraft which flew to Europe.

After completion of military service Mr. Sherman took part in the founding of a company that overhauled and serviced aircraft components such as starters, generators, pumps, carburetors and many other aircraft accessories.

This company "Accessory Overhaul Industries" was founded in 1946 and existed for fifteen years. In the late forties, the Civil Aviation Administration (CAA) was petitioned for a "Repair Station Rating". The CAA stated they had no ratings for an accessory overhaul company. Finally, with the help of Senator Long of Lousiana, the CAA was convinced to set up a repair station category for accessory overhaul and the Company received the first license.

For 36 years, the Company maintained an "FAA Approved Repair Station" through three different companies.

Aircraft Parts has secured hundreds of "Parts Manufacturing

Approvals" (PMA), hundreds of "Supplemental Type Certificates" (STC) and a large number of generators approved under "Technical Standard Orders" (TSO).

In working with the CAA and then the FAA, Mr. Sherman has observed those organization go from personnel dedicated to the safety of people who fly aircraft and dedicated to the safety of passengers who pay to ride in aircraft, to a bureaucracy comprised of rule makers and rule interpreters who make air safety third or fourth among their priorities. They have forgotten why they were created in the first place.

In securing PMAs, and STCs, in the early years, foremost on the minds of the FAA employees was air safety. The CAA and FAA were cautious of what was approved and required testing to approve as airworthy the items a manufacturer wanted to make.

In the following years the FAA rules to secure PMAs were loosened and air safety started to slide downward. This was noted by the increasing amount of failures of accessories that were sent to our company for overhaul. These failures in many cases were the result of designs which were not adequately tested prior to being approved.

The regulation of manufacturers became so loose that thousands of bogus parts were being sold with no effort by the FAA to prevent their sale.

The proposed rule changes by the FAA should make it easier to get a PMA and STC but the rules must be consistent with air safety. No parts should be approved without adequate testing by the applicant in the device in which it is intended to be used.

No applicant should be allowed to manufacture a part from an old blueprint which the original equipment manufacturer has revised due to problems with the original design.

All original equipment manufacturers test their parts when the accessory or component is assembled and put in a test cell to simulate aircraft conditions. Why should a PMA applicant do less?

The aircraft owners, aircraft operators and those who pay to fly deserve no less. Flight safety should not be ruled away by the FAA. All manufacturers and all members of Congress should be interested in safety first. Competition and expense must not become arguments to jeopardize safety.

Respectfully submitted,

Francis L. Filipowski

Mr. **Ireland**. That association in two paragraphs has said a lot about why the Regulatory Flexibility Act was passed in the first place.

Lastly, a statement to be put in the record by Whittaker Controls, concerning their impression of testimony that was presented in our first hearing.

[The material referred to above appears on p. 401.]

Mr. **Ireland**. With that opening comment, I would like to call Mr. Beard, Director of Airworthiness, of the Federal Aviation Administration, along with Mr. Safeer and Mr. Faberman.

Mr. Beard, the microphone is yours.

TESTIMONY OF M. CRAIG BEARD, DIRECTOR OF AIRWORTHINESS, FEDERAL AVIATION ADMINISTRATION, ACCOMPANIED BY HARVEY SAFEER, DIRECTOR OF POLICY AND PLANS, AND EDWARD FABERMAN, DEPUTY CHIEF COUNSEL, FAA

Mr. **Beard**. Thank you very much.

Mr. Chairman, and members of the subcommittee, I am Craig Beard, Director of the FAA's Office of Airworthiness.

With me today from the FAA are Harvey Safeer, Director of Policy and Plans, and Edward Faberman, Deputy Chief Counsel.

As Director of Airworthiness, I issued the Notice of Proposed Rulemaking being considered in these hearings, that is NPRM 77-19C which was entitled "Parts Manufacturers Approvals; Falsification of Airworthiness Certification Documents."

This NPRM was published in the Federal Register on January 15, 1981.

I also issued revision "D" to that notice on July 2, 1982, to extend the public comment period on NPRM 77-19C from May 15, 1981 to September 21, 1981.

One correction; I did say July 2, 1982. I meant to say July 2, 1981, when I issued the revision to the notice. The Office of Policy and Plans, represented here today by the Director, Mr. Safeer, is the FAA office responsible for completing regulatory flexibility analyses, and is therefore the office that has been working with the Small Business Administration to develop the FAA's recently published draft "Definitions of Small Entities and Guidance Material for Making Determinations Required by the Regulatory Flexibility Act of 1980."

The Office of the Chief Counsel, represented by Mr. Faberman, is responsible for reviewing all FAA notices of proposed rulemaking and final rules for legality and form, and for monitoring FAA rulemaking procedures to insure compliance with the Administrative Procedure Act, Executive Order 12291, Department of Transportation policy, and other statutes and requirements.

We welcome the opportunity to appear before this subcommittee today to describe FAA's implementation of the Regulatory Flexibility Act in general, and in particular why in Notice of Proposed Rulemaking 77-19C, I certified for the Federal Aviation Administration that: "It has been determined that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities."

We also appreciate the opportunity to "clear the air" on a number of general aircraft spare parts approval issues raised by testimony before this subcommittee on Tuesday, July 27. We will do our best to respond to all questions you may have concerning Notice of Proposed Rulemaking 77-19C, to the extent we can do so, consistent with the legal restraints imposed on discussing pending rulemaking activities.

In your letter of July 29, the subcommittee provided us with a list of specific issues that you would like for us to address. Our response to each of the questions for FAA staff on the PMA rule are attached to this statement for the record. The questions for the Administrator were answered in a separate letter from the Administrator.

Mr. Chairman, with that introduction, permit me to touch first on the general subject of FAA's implementation of the Regulatory Flexibility Act.

We at FAA firmly support the principles of not only the Regulatory Flexibility Act but those envisaged by the public rulemaking provisions of the Administrative Procedure Act, of Executive Order 12291 issued by President Reagan on February 17, 1981, the Department of Transportation regulatory policies and procedures, 44 F.R. 11034, of February 26, 1979, and of the FAA General Rulemaking Procedures which are set forth in Federal Aviation Regulations, 14 CFR Part 11.

We believe that adherence to these principles improves FAA rulemaking by providing increased and more meaningful public participation. With respect to the Regulatory Flexibility Act, we review all proposed rules both at the NPRM and final rule stage to determine if an initial or final regulatory flexibility analysis is required.

Since the start of the Reagan administration, out of 21 important FAA NPRM's and final rules, only one has required a regulatory flexibility analysis, and that was for a rule with beneficial economic impact for small businesses.

The reason so few analyses have been required pursuant to the act is that the notices and rules that have generally been issued either impacted only a few small businesses or involved limited economic impact.

The main thrust of Administrator Helms regulatory program has been to reduce, without compromising safety, the regulatory burden whenever possible.

The act requires the FAA to use Small Business Administration definitions of aviation small business unless the agency adopts definitions after consultation with SBA and public comment.

To aid agency rulemaking officials, such as myself, in making appropriate and consistent "reg. flex. analysis determinations," the Office of Policy and Plans, headed by Mr. Safeer, has prepared through an extensive effort and with assistance from SBA, a draft document entitled "Department of Transportation/Federal Aviation Administration Definitions of Small Entities and Guidance Material for Making Determinations Required by the Regulatory Flexibility Act of 1980."

SBA provides us with their written comments on this document on July 22, 1982, and an invitation for public comment was published in the Federal Register on Thursday, July 29. We are quite proud of this effort and sincerely appreciate the kind words in that regard provided by the spokesman from SBA's Office of Advocacy before this subcommittee on July 27.

Using a combination of SBA's small business size standards, our draft guidance material, and our best judgment, we try to make an objective, honest determination of whether or not a regulatory flexibility analysis is required for an NPRM or a final rule. Making these determinations often requires a considerable analytical effort.

This effort is in addition to that needed to conduct the economic analysis required under DOT procedures, which is a self-imposed check on the impact of our rules that is not done by most other agencies.

We try to identify small entities which may be affected by a rule, quantify the cost per entity, and assess the significance of these costs. Over time, we have continued to improve our data on small entities and to refine our capabilities to make meaningful determinations under the act. We also have begun the long and complicated process of reviewing agency regulations which were in effect on January 1, 1981 in accordance with the act.

That is where we stand today, 1-year and 9-months after the effective date of the Regulatory Flexibility Act. At the time that NPRM 77-19C was issued, January 8, 1981, the Regulatory Flexibility Act had been effective for 8 days. The guidance material, data base, and analytical methodology available to us at that time for implementation purposes was extremely limited.

Things had not improved much in this regard by July 2, 1981, when we issued NPRM 77-19D, which merely extended the public comment period, except that by that time I did have the benefit of about 38 submittals to the rules document on NPRM 77-19C.

It was my best judgment at the time I signed the certification statement on NPRM 77-19C and again on NPRM 77-19D, that the proposals of those notices would not in fact have a significant economic impact on a substantial number of small entities.

This judgment was based first, on my intimate knowledge of the true intent of the proposals, having personally had a hand in their writing; second, on my 26 years of aeronautical engineering experience in civil aeronautical product design and certification matters, including experience in both seeking and later granting FAA approvals; third, on my knowledge that most of what was proposed in Notice of Proposed Rulemaking 77-19C was either a proposal to codify in the Code of Federal Regulations [CFR] what had been set forth in national policy guidelines provided by FAA headquarters to the regional offices since 1975, or incidental relaxations therefrom; and fourth, with this background, on my review of the comments received to that date on the proposal. That was the best data base and methodology we had at the time.

Also, since we have repeatedly advised the SBA's Office of Advocacy, because of their particular interest in this rulemaking, we will prepare a final regulatory flexibility analysis, taking benefit of all the information received, before final disposition of the proposal. That fact still stands, Mr. Chairman, and we will be pleased to provide this subcommittee a briefing on our final disposition, and on our evaluation of its impact on small businesses when it has been completed.

We cannot overemphasize that we did comply with the Regulatory Flexibility Act when we issued Notice of Proposed Rulemaking 77-19C, to the best of our knowledge and ability at that time, and that this rulemaking will not be completed without full compliance with the letter and spirit of the Regulatory Flexibility Act. We continue to be committed to not issuing any PMA rule that will adversely affect small businesses.

Before going further into NPRM 77-19C and related issues, I would like to highlight one other initiative FAA has taken toward more responsible rulemaking.

As you know, we deal with safety issues in many of our rules. It is so easy for safety regulatory agencies such as FAA to hold up the "safety" banner to justify rules.

In these times, it is becoming increasingly important for agencies such as ours to make a better effort to objectively quantify the safety benefits and measure them against the economic cost to insure that a safety benefit will be derived which clearly justifies the costs to our economy.

The FAA has undertaken two major initiatives to lay down a methodology, and to establish a data base to [illegible] a more creditable safety benefit/cost analysis in the future.

In January 1982, the FAA Office of Aviation Policy and Plans, again, which is headed by Mr. Safeer, issued a guide for "Economic Analysis of Investment and Regulatory Decisions," to provide guidance on a methodology. In addition, the Office of the Associate Administrator for Aviation Standards, the Office to which I report, is developing a computer-based aviation safety analysis system, which we call ASAS.

ASAS is intended to provide advanced computer techniques to assess and analyze data bases to provide the capability to complete these analyses.

We are quite proud of these initiatives as they are developing, and we believe they clearly demonstrate FAA's desire to excel in satisfying the principles of the Administrative Procedure Act, as well as the Regulatory Flexibility Act, and Executive Order 12291. I would like to return to the general issues of civil aeronautical replacement parts and then discuss NPRM 77-19C in particular.

First, for Congressman Skelton's benefit and in response to questions at the July 27 hearing, let me state that I am aware of no relationship between FAA approval of parts for civil application and military procurement practices.

We have seen no evidence that the military services have required civil approval of spare parts nor can we imagine that they would want to. We would not even have a regulatory basis to approve such parts unless they had a civil application. It is true that there are some parts common to both civil and military application but, even in these cases, it is our belief that only a small percentage of military procurements are of this type and those that are, are accomplished independently of any FAA parts approval program, except possibly when the military is dealing with an "off-the-shelf" civil aircraft purchase.

We believe that some of the design data that finds its way into the public domain and appears with PMA applications comes from these independent military procurement efforts.

Second, to clear another issue raised at the July 27 hearing, FAA does not regulate either the pricing practices of the original type certificate holder—sometimes referred to as the original equipment manufacturer [OEM]—or the alternate parts source pricing practices.

We are sensitive to these issues and surely do not want to adopt regulations or practices that would have the effect of increasing the cost of parts unless there was a compelling safety need for the regulations.

On the contrary, as we hope to convince you with respect to NPRM 77-19C that it is our firmly established goal to reduce costly and anticompetitive regulations where we can do so without compromising safety in air commerce.

Mr. Chairman, your opening comments at the July 27 session indicated that you have a clear grasp of the genesis of the FAA's PMA concept and of the need for programs such as PMA to assure the safety of parts from alternative sources. Therefore, I do not want to take the subcommittee's time on the safety fundamentals behind this concept.

However, in light of some remarks made on July 27 by yourself and witnesses, we do believe some clarifications are needed concerning the regulatory history of the PMA program as we know it today.

Significant changes were made to the PMA rule, subsequent to its introduction in 1955, which have an important bearing on understanding the relative impact of NPRM 77-19C. The PMA rule as it is today addresses three basic concerns: (1) Design approval of the PMA part; (2) approval or acceptance of the production quality control system under which the PMA part will be manufactured to insure that the PMA parts are produced in exact conformity with the approved design, and (3) the PMA part making requirements to insure proper utilization and source traceability of a PMA part that might have an inservice problem.

The central issue of NPRM 77-19C concerns the first item, the manner by which the FAA accomplishes its design approval functions for PMA parts. There certainly are other issues in NPRM 77-19C but, for the most part, they all flow from that central issue. To accurately measure whether or not NPRM 77-19C would increase or decrease the burden on the PMA applicant, one must clearly understand existing PMA practices and how they evolved to where they are today.

We most emphatically disagree with a previous witness who would have this subcommittee, OMB, SBA's Office of Advocacy, the Department of Justice, and "members of the aviation industry" that we are proposing a significant change from what has worked successfully for the past 25 years, and that this change will put PMA holders out of business. To put the "burden issue' in perspective, I would like to recite the evolution of our existing regulatory policy and practices for the design approval of PMA parts.

On July 26, 1955, effective August 25, 1955, Civil Air Regulation 1.55 was adopted to provide for persons other than the holder of a type certificate to produce replacement or modification parts for sale for installation on type certificated products include complete aircraft, complete engines and complete propellors.

We constantly refer to them as the OEM's.

In 1965, well after the Civil Aeronautics Administration became the Federal Aviation Administration, CAR 1.55 was recodified as FAR 21.303, which referenced other sections of FAR 21. Then FAR 21.303 was subsequently amended in 1972 and again in 1974 to clarify the rule and to reduce the burden on the PMA applicants. The 1972 amendment is key to understanding the current level of burden in obtaining design approval for PMA parts.

The "identicality" concept was first given regulatory legitimacy through that amendment 10—not 25—years ago.

On August 13, 1969, a Notice of Proposed Rulemaking 69-36 proposed to consolidate all of the requirements for PMA and the policies applied under old Civil Aeronautics Regulation 1.55 into Federal Aviation Regulation 21.303.

The preamble of NPRM 69-36, plus the policy material associated with CAR 1.55, make it clear that at that point in time, it was envisaged that design approval for PMA parts—other than parts made under license—would usually be accomplished by engineering analysis and tests conducted by the PMA applicant with design substantiation data being submitted for the FAA's engineering evaluation.

In short, the "identicality concept," as we know it today, had not as yet been codified into the regulations.

Again, Mr. Chairman, it is the same as it was just 10 years ago prior to amendment 21-38 which was adopted in May 1972.

In the preamble to the 1972 amendment, which emanated from the 1969 notice, it was acknowledged that through issuance of an Advisory Circular [AC] 21.303-1 issued in March 1966, the FAA had accepted a practice, without regulatory amendment unfortunately, of granting design approval for PMA parts, provided among other things, the applicant submitted extensive data substantiating that the PMA part would be identical in all respects to the corresponding part of an approved type design.

That 1966 advisory circular also made it quite clear—and this is a public document—that in such cases, the FAA reserved the right to require further substantiation through tests and analysis to establish that a so-called identical part met the applicable airworthiness requirements, when in the FAA's opinion the airworthiness of a critical part or design could not be assured by the mere showing of identicality to approved design data.

The knowledge that testing may be required as expressed in current FAR 21.303(f)(1), and again as envisaged by proposed FAR 21.302(d) of NPRM 77-19C, is traceable to Advisory Circular 21.303-1, that is, Mr. Chairman, it is traceable to 1966. It is not a new concept.

Amendment 21-38, adopted May 19, 1972, gave us FAR 21.303(c)(4) as it reads today, which relieves the PMA applicant of submitting test reports and computations for design approval provided that—and this is a very important provision: "* * * the applicant shows that the design of the part is identical to the design of a part that is covered under a type certificate." It can be made by a showing.

Advisory Circular 21.303-1A, issued August 1972—superseding AC 21-303-1—which is still in effect today, continues to place the burden of substantiating identicality on the PMA applicant, stating that "if the applicant can show that each part that he wishes to have approved is identical in design, material, and processing to the corresponding approved part, the FAA will approve the applicable data."

Advisory Circular 21.303-1A continues to make it clear that FAA reserves the right to require testing and other substantiating computations when in the FAA's opinion the airworthiness of a critical part or design cannot be assured by the mere showing of identicality to an approved design.

The recitation of the pre-1972 policy evolution shows that it has been a practice in the PMA program, is that it first evolves as an FAA field office innovation, followed by a national policy statement and then codification of a practice occurs in the regulation. Without justifying this method of policy promulgation and I certainly don't, I would say that it has occurred because of the difficulties and controversies we have experienced in administering the PMA program over the years.

This evolution of policy did not end in 1972. On October 31, 1975, because of field office practices which had begun to evolve and with an interest in further reducing the burden on the PMA applicant of substantiating identicality, FAA headquarters issued a policy memorandum to the field offices which led to FAA's current practice of comparing PMA data with OEM data.

That policy memorandum provided that the applicant, "* * * submit his data to the FAA along with a certifying statement that his data is identical to the previously approved data by identifying the previously approved data completely, by nomenclature, part numbers, data revision, and revision letter/number." That policy was established in late 1975 and is our current policy today.

In the main, NPRM 77-19, which we issued in August 1977, sought to codify and give regulatory legitimacy to these existing FAA practices.

NPRM 77-19C, which I issued in January 1981, continued that effort to codify existing practices but with further reductions in the burden for PMA applicants by proposing to: (1) Reduce the time delays associated with preapproval FAA data comparisons, and I would emphasize preapproval FAA data comparisons, and (2) limit FAA's prerogatives to call for testing in "identicality cases" to certain precision parts, with examples for guidance.

Should this rulemaking fail, or be unreasonably delayed, then the existing field practices for issuing PMA's could come under serious legal challenge. A strict literal application of FAR 21.303 as it reads today would be absolutely devastating to small businesses that might wish to obtain PMA's in the future.

Adoption of the rule we proposed in NPRM 77-19C would give regulatory visibility to current practices, providing for more, not less, competition in the spare parts marketplace. It is our conviction that the rulemaking proposed in NPRM 77-19C will stimulate small businesses to obtain PMA's on parts they now manufacture for both OEM's and for large PMA holders. This conviction is validated by the results of our regional office survey. This increased small business entry into the marketplace was anticipated when we issued NPRM 77-19C and, we believe, may be the hidden reason some existing PMA holders and even OEM's have so aggressively opposed this notice.

With that regulatory history as background, I believe it is also important for the subcommittee to know that, first, PMA parts are only a small portion of the total replacement parts' universe and; second, with one exception, that the kinds of parts characterized as typical of PMA parts, by a witness at your July 27 session, are unique and of minor significance in relation to the majority of replacement parts approved under the PMA system.

In fact, with the one exception of Execuair which I will come back to later, I would characterize the testimony on July 27 as a continuation of the "McCoy versus Hatfield" feud between one particular and unique PMA holder and the OEM, with FAA caught in the middle. The picture painted by this feud is nonrepresentative of the total PMA universe.

On July 27, I provided the subcommittee staff with a copy of a very thick computer generated PMA listing. I also brought a copy of it along if anybody would like to look at it. As you see, Mr. Chairman, this document of fine print lists thousands of PMA parts available from hundreds of PMA holders. A quick review of this document will show evidence that the PMA program covers a wide range of parts, including many that are critical to the safety of large transport category airplanes.

The first witness on July 27 handed you some simple replacement parts for a reciprocating engine—exhaust valve guides if my memory serves me right—and represented them to this subcommittee as "typical of PMA parts."

This, in my opinion, is an incorrect representation of the PMA program. However, I am confident that the subcommittee can and will compare for itself the parts exhibited by that witness against the complete PMA list and reach a correct conclusion on the kinds of PMA parts that are typical. Our rule must address the true and total PMA universe.

The one exception I mentioned earlier was the so-called "simple part made from bar stock," exhibited by Mr. Manhan of Execuair. I believe Mr. Manhan stated "he saw nothing technical about it."

While I was manager of the FAA Aircraft Engineering Division in Los Angeles, as Mr. Manhan testified, that office granted Execuair many PMA's for many small parts that go into critical safety-related electromechanical valves for transport category aircraft. Valves which were originally manufactured by yet another PMA holder—Whittaker Controls. Unfortunately, I do not have a cutaway model of a Whittaker firewall shutoff valve or engine bleed valve available, but I do have this cutaway of a typical aircraft hydraulic pump. Even though there certainly are differences in design and purpose, both kinds of devices are similar in complexity.

Also, since many PMA parts are detail parts for hydraulic system components such as this, I have brought this cutaway model along to make an important point.

This is a cutaway of a variable rate hydraulic pump, which pumps hydraulic fluid at 3,000 p.s.i., operating a 150 r.p.m. This is typical of hydraulic pumps used to power the primary flight control systems of major transport category aircraft.

These kinds of assemblies and the kinds of valves that Execuair provides parts for are typically made up of dozens of what might appear to a layman to be simple parts—to quote Mr. Manham—that could be made of "bar stock."

However, to an engineer, it becomes very clear that we are dealing with high precision, tolerance-critical, process-critical parts. If they bind because the tolerances are off; if they wear excessively because of metallurgical inadequacies, heat treating deficiencies, or improper surface hardening process; if they permit metal particles to chip or wear off and contaminate the hydraulic system; if overtolerance leakage rates occur because of improper mating or bad seals, we could find ourselves with a very real in-flight safety problem.

We are not talking about a PMA for the complete pump assembly or the complete valve assembly, even though such could be obtained. We are talking about a PMA for each of these small, so-called simple, individual parts like screws, seals, springs, slides, bushings, and clips. Comparing design data on such items involves considerably more than having a "board engineer" holding two drawings up to the light as was characterized by the ex-FAA engineer on July 27.

It is serious business, it is time consuming, and the data, including process specifications, for all these little items comes in large bundles. As a professional engineer, I know of no basis for a statement that there is "nothing technical" about these kinds of parts.

I stated earlier in my statement that PMA parts are only a portion of the replacement parts in the marketplace. Let me explain some of the other legal sources. First there are the parts from the OEM or type certificate holders, which are the manufacturers of the original aircraft, engine, or propeller. They are the parts constructed to an FAA approved design in a manufacturer's quality control system which was also approved by the FAA.

Second, we allow owners and operators of aircraft to fabricate parts for maintaining or altering their own aircraft, engines, or propellers.

We also permit FAA-approved maintenance facilities, for example, repair stations and airline maintenance bases, to fabricate parts to approved designs within their FAA-approved quality control system, provided they install these parts on an aircraft, engine, or propeller for which they assume full responsibility for returning to service as airworthy.

We also have a technical standard order [TSO] authorization program, similar in process to the PMA program, to provide for FAA approval of appliances and articles of equipment such as seats, tires, instruments, and the like. Our regulations also permit the production of many standard parts such as certain nuts and bolts without PMA, provided they conform to established industry or U.S. specifications.

My point is that there are many acceptable parts in service from alternative sources other than the OEM and PMA holders. There are other sources and we are seriously concerned about the market flow of unsafe, unapproved parts. Many of these unapproved parts may truly be bogus, unsafe, or counterfeit parts. The data is out there, at least a sufficient level of geometrical data, to cut out look-alike parts. Unfortunately, we are also aware that many vendors and suppliers to prime manufacturers, small businesses for the most part, contribute to the flow of "unapproved parts," or parts which are often safe and of very high quality, but unapproved just the same.

Before we can get an enforcement handle on the truly unsafe bogus parts, we must reduce the quantity of safe but unapproved parts.

One way we had hoped to do this is to make the PMA rule less burdensome for potential PMA applicants—many vendors and suppliers to OEM's and even PMA holders—who know and are willing to certify and stand fully responsible for the identicality of their product design to an already approved design. That, Mr. Chairman, is the safety issue involved in NPRM 77-19C. As was repeatedly stated in the preamble of NPRM 77-19C, the proposal was intended to relieve the regulatory burden on the PMA applicant for parts which the applicant knows are identical in design to an already approved design.

As I have mentioned earlier in my statement, if the words in the existing PMA regulation of FAR 21.303(c)(4) were applied as written, the PMA applicant would be required to "show" identicality. The policies mitigating the burden of FAR 21.303(c)(4), set forth by our memorandum of October 1975, were objected to by an OEM, on the grounds that they were inconsistent with prior and more proper regulatory interpretations. To publicize this new relaxed policy, we proposed NPRM 77-19 to codify the policy guidance of this 1975 memorandum in our rules.

When we were considering disposition of the current NPRM 77-19C in January 1981, one option considered was to withdraw the notice and terminate further rulemaking on the subject altogether. That option was rejected by me because of my concern that it could lead to a legal challenge of the 1975 policy. Should that policy be overturned by a legal test, such consequences could be devastating to literally hundreds of truly small businesses that would not be able to obtain new PMA's because they could not "show" identicality. They could also have the legality of their existing PMA's placed in question.

Moreover, from a safety point of view, this could certainly lead to an upsurge of "unacceptable" blackmarket parts, and a potential loss of safety in air commerce.

I must mention another important consideration that led to NPRM 77-19C, that is the need to hold down Government and administrative costs, costs picked up by the general taxpayer. We have had no significant safety problems on parts that have actually been approved under the PMA process. NPRM 77-19C was issued to reduce burdens. The main burden we were trying to reduce was the burden on the PMA applicant, the burden, among other things, of obtaining OEM data per pre-1975 policies or of waiting for the FAA to do the long, drawn-out detail design comparisons now conducted under the policies established in the 1975 memorandum.

A careful reading of Mr. Manhan's testimony, particularly his responses to your questions, and his comments to the NPRM 77-19C docket, certainly corroborates the fact that a burden exists on the PMA applicant as well as on the FAA.

As I said earlier, I was manager of the Aircraft Engineering Division in Los Angeles when Execuair really began to get underway in gaining PMA approval for replacement parts for Whittaker valves. They would bring in literally hundreds of drawing sheets on small, but detailed, parts. Data comparison for assessment of identicality involves much more than comparing geometrical descriptions on two drawings held up to the light together. There are matching tolerances, alloy composition, metallurgical considerations, heat treating, surface hardness, surface finish, as well as other critical manufacturing processes, and for many complete assemblies, performance tolerances. Incidentally, we don't consider Whittaker Controls to be an OEM per se; they are a supplier to OEM's and PMA's.

In anticipation of one of your questions, yes, I heard the testimony of Mr. Backstrom, ex-FAA employee from our southwest region, stating it was generally a simple 1-hour task.

This may be true because of the very unique aspects of Superior Air Parts items, since they are usually manufactured for Superior Air Parts by the same machine shop that makes them for the OEM, on the same tools, using the same manufacturing processes, and often under license from the OEM.

He is certainly qualified to talk about these parts because he did many of those comparisons for Superior Air Parts before he retired from the FAA last April. I, too, worked as an engineer in that office, in fact with Mr. Backstrom, and I am familiar with what goes on at that and other offices. I can assure you that the PMA burdens in that office are minimal compared to the more significant PMA activities in areas like Boston, Chicago, and Los Angeles.

Mr. Chairman, I believe you can place Mr. Backstrom's statement in proper perspective from the workload identified in the FAA "survey results" provided to the subcommittee. Issues were raised at the July 27 session concerning FAA workload like, "Why shouldn't FAA continue these detail comparisons?" I believe was the essence of the question raised by one witness.

For the record, Mr. Chairman, let me state that even though we are trying to hire more engineers, the number of engineers, inspectors, and flight test pilots actually on board in FAA aircraft certification work is approximately 350. At any one time, I would estimate we probably have on hand about 2,000-plus design approval requests of one magnitude or another.

The Boeing 767 certification activity would only be counted as one of those requests, as would a request for design approval of a simple PMA engine exhaust valve guide.

Therefore, to give you a better feel of workload: In fiscal year 1981, we issued about 15 type certificates for the design of new airplanes, engines, and propellers; we approved designs for over 200 major new variants to models previously approved under existing type certificates; we approved the design of nearly 1,000 major design modifications, custom installations, to existing aircraft in service; we issued over 200 new design approvals for appliances under the TSO program and approved about 300 new manufacturer quality control systems under the TSO program; and we issued eight new production certificates for OEM's and approved 10 production inspection systems for smaller manufacturers of aircraft, engines, or propellers.

Well over 13,000 new airworthiness certificates for individual aircraft were approved. The aircraft certification staff is also expected to assist in developing safety standards and criteria, to assist in accident and incident investigations, and to monitor the safety performance of over 20,000 previous approvals of aircraft designs in-service and quality control systems in operation. This work was accomplished in addition to the PMA workload which ranged into the hundreds of parts.

At the time we issued Notice of Proposed Rulemaking 77-19C, we honestly desired to rely on a certifying statement from the PMA applicant for the true "identicality cases" and have it recognized explicitly in the regulations for public and legal awareness that that would be the principal basis for our PMA design approvals in those cases.

As stated before, existing PMA parts have demonstrated a satisfactory safety record and we did not believe this relaxation of burden in showing identicality would change that fact. Also, this method is directly analogous to how we have processed design approvals under our TSO program which has worked without serious safety consequences for years.

Existing PMA marking requirements presently permit us to trace deficient parts back to their source for corrective action, and the new marking requirements were intended to help the maintenance personnel determine when a PMA part was eligible for installation in a particular assembly.

Contrary to the previous testimony, there was no intent in NPRM 77-19C to remark parts in stock. When we plan to apply a new rule retroactively, it is our practice to say so in the notice, and we did not in this case.

Mr. Chairman, let me summarize where we are in our rulemaking effort today. We in the Office of Airworthiness are finalizing our technical analysis of the many diverse comments received.

When this staff work and the regulatory flexibility analysis is completed, a recommendation with alternatives will be presented to Administrator Helms for his final decision.

Some basic alternatives are obvious: (1) Withdraw the NPRM; (2) issue a further revision to the NPRM 77-19 series in a new NPRM 77-19E; (3) issue a final rule with language changes to insure the language is clearly consistent with the intent expressed in the preamble portion of the notice and in consideration of the comments received, and (4) issue the final rule as proposed without change.

Subalternatives will certainly be considered under both (2) and (3). A decision on which of these alternatives will be selected has not yet been made by the Administrator.

Let me amplify some on alternative one to withdraw the NPRM. The intent of NPRM 77-19C is to codify existing policy guidance issued to the field and applied since 1974 and should the NPRM be withdrawn, we would have to consider establishing new policy, which would be consistent with the existing 1975 rule. Such policy, we believe, would restrict the emergence of new PMA approvals.

Probably the one most controversial issue raised by the commenters related to the proposed requirement for identifying the OEM's part by "part number, including drawing revision designation." Comments were received indicating that, without the cooperation of the original parts manufacturer, a PMA applicant may be unable to obtain information such as design revision drawing numbers. Consequently, the commenters argued that the identification requirements were unduly burdensome, would preclude new PMA's and thus would be anticompetitive. Certainly that was not our objective in proposing those requirements.

Our objective was to insure that the FAA had sufficient information to identify the part to be replaced, that is the OEM part to which the PMA part was "identical."

Although we continue to believe that a PMA applicant must be able to sufficiently identify what part it is that he seeks to replace, given the nature of the comments received, we may have been too specific in describing how to identify the part.

Therefore, as one alternative, we are looking at ways for any final rule that might be issued to more clearly reflect the intent expressed in the preamble of NPRM 77-19C. This same observation applies to that aspect of the proposed rule which deals with marking of parts by a PMA manufacturer.

There seems to be no argument that FAA must be able to trace failed parts to their original source for safety analysis purposes.

Throughout this rulemaking process, we have paid careful attention to the public concerns expressed. We have reopened the public comment period on NPRM 77-19 on November 25, 1977, first at the request of Superior Air Parts, Inc. On April 6, 1978, the comment period was again reopened to allow additional persons and organizations to submit comments to the docket. That was requested by Avco-Lycoming to give them a chance to reply to Superior Air Parts' comments. On January 8, 1981, the FAA reissued NPRM 77-19 in a "C" revision to further refine the PMA rules in light of comments received on NPRM 77-19.

We first denied requests from Superior Air Parts, Precision Air Parts, and Avco-Lycoming to reopen the comment period on NPRM 77-19C because unlike NPRM 77-19, NPRM 77-19C had both a basic comment period of 3 months plus a reply comment period of 1 month. However, at my decision after a second request from Superior Air Parts, the public comment period for this notice was reopened by issuance of NPRM 77-19D on July 2, 1981.

In short, we have actively sought, and listened to the public comments at every step of the way in this rulemaking. I can assure you that any rulemaking we may undertake on this issue, while preserving safety, will reflect a sensitivity to those comments. I must add that no FAA rulemaking has had as much opportunity for public participation as this effort. All parties have been given every reasonable opportunity to become involved in this effort.

Before closing, Mr. Chairman, I want to touch again on the subject of the regulatory flexibility analysis for our PMA proposals. My intent when proposing the rule changes, as I have already indicated, was to reduce unnecesary regulatory burdens in the PMA process. Accordingly, I reached the conclusion that a "regulatory flexibility analysis" as defined by the act, was not required in view of the potential impact of the rule on small entities. Obviously, there are persons who now question that conclusion. Consequently, to assure full public awareness of our assessment of any potential impacts of this rulemaking on persons seeking PMA's, should a final rule result from this rulemaking activity, we will prepare and publish a regulatory flexibility analysis—whether or not mandated by the act—and will allow time for informed public comment before permitting any rule to become effective.

One last remark, Mr. Chairman. As you know, I was here on July 27 and heard all of the testimony presented that day. I had 3 persons with me, 2 staff engineers who are working this project, plus the manager of the Regulatory Analysis Branch, which is in Mr. Safeer's office. Since July 27, we have studied the prepared statements handed out that day.

Additionally, I have personally read and studied every comment in the rules docket. We have neither heard nor read any new comments from these proceedings of technical or economic substance relative to the proposals of NPRM 77-19C that have not already been made to the rules docket. All of these comments are being given serious consideration in the staff work being prepared for final decision on this matter.

Thank you, Mr. Chairman, for your patience with this lengthy statement. I believe we share a common goal to protect the interest of small businesses. We would be pleased to respond to additional questions you may have at this time.

Mr. **Ireland** I think it was important that you read the entire statement, I am happy you did. In this environment, too often the statement is put in the record and the essence of it does not come across. In my view, sometimes it is necessary to do it not only for us but for the audience as well. I appreciate your indulgence along that line.

Mr. Skelton, if you have some comments or questions?

Mr. **Skelton**. Thank you very much, Mr. Chairman.

Have you ever heard of Mark Twain?

Mr. **Beard**. Oh, certainly; I am a Kansas farm boy. That is not too far.

Mr. **Skelton**. He once said the more you explain it to me, the more I do not understand.

Mr. **Beard**. I understand your comment, Mr. Skelton.

Mr. **Skelton**. I am afraid I found myself somewhat in that position.

In your statement you say, "I am aware of no relationship between the FAA approval of parts for civil applications or military procurement practices. We have seen no evidence that the military services have required civil approval of spare parts, or to be imagined they would want to."

In Mr. Manhan's testimony, I have some letters with me, one that I referred to dated July 15 from the Department of the Air Force regarding solicitation, and he quotes from the letter. There seems to be some evidence, and I would like to know the answer to it.

Second, I am quite concerned in looking at the prices that are charged civilian customers and the costs paid by the Government, particularly the military; these figures are much, much higher. I would like to know just why that is. Are they trying to recoup or who is it, sir?

Mr. **Beard**. I have been led to believe that is a big portion of it. However, Mr. Skelton, it is an area in which I have absolutely no expertise on pricing.

The PMA program is simply to grant approval for installation on civil aircraft. If the military should elect to lay PMA approval down as a contractual issue, that is something the FAA does not get involved in and has not been involved in to my knowledge. I guess, rather than to try to make an answer to you for a question that I do not know the answer, I will just have to say I do not know the answer. It is not a legitimate concern of the FAA.

Mr. **Skelton**. It is a very legitimate concern of this Congress and both this committee and the Armed Services Committee; I am on both. I am deeply concerned. It looks like the Federal Government is getting it put to them quite substantially if you believe those figures presented to us in the hearing. I would like this question answered, I do not know if I will get it but I am going to, I believe, get it.

Mr. **Beard**. If we had the answer, we would be delighted to provide it to you. I believe the Department of Defense would be a more appropriate source considering our relationships.

Mr. **Ireland**. Would you yield?

Mr. **Skelton**. Yes.

Mr. **Ireland**. I have some comments to make before we get into some fairly detailed questions. One of them bears on the exact subject Mr. Skelton addresses.

I submit to you, Mr. Beard, that while you say that this is not an area for the FAA, you say you have no expertise here, and yet you say you are interested in upholding the Regulatory Flexibility Act.

Now the Regulatory Flexibility Act has to do with competition and economic analysis, which I am delighted you are going to make. I think it should have been done in the first place.

I want you to make a direct connection with the real world here. The problem that Mr. Skelton has, as a member of the Armed Services Committee, unless your regulations permit people to produce those parts at a low price, we are going to have the kind of thing that concerns Mr. Skelton, and your economic analysis when you submit it here, at least for this panel, should address that.

It is a legitimate concern, it is what that analysis is all about and you need to have consultations with the counsel of the FAA. That is why the Regulatory Flexibility Act was passed. Your actions at the FAA have a domino effect, and when we don't have the maximum number of people producing those parts, we are going to get the situation that Mr. Skelton refers to. Now, the FAA doesn't live in a little ivory tower all by itself. That economic analysis has to include that and that is what this regulation is all about.

I am delighted that you are going to do it. I am anxious to see it.

Mr. **Skelton**. Mr. Chairman, would it be in order for me to request that we ask this gentleman to return to us with his full answer and detailed explanation on this issue the first week we get back in September?

Mr. **Ireland**. I think that would be a legitimate request.

Mr. **Safeer**. I will probably have to do this. May I ask a clarifying question?

Are you asking us to do it in a relative sense or absolute sense. We have a rule in effect for PMA's now.

Mr. **Ireland**. You have stated you will make an economic analysis under the Regulatory Flexibility Act.

Mr. **Safeer**. Which begins with the change in the rule, the proposed change in the rule.

Mr. **Skelton**. The first thing, Mr. Chairman, is what in the world is their past disparity and what can we expect in the future? You can apply it to your rule if you want to.

Mr. **Beard**. Mr. Chairman, I am a little concerned that possibly you misread the intent of my statement.

What I was trying to say was that when we issued a regulation we do wish to be and we consider ourselves extremely sensitive to not driving the cost up, to make sure the regulation has enough flexibility that we don't drive the cost up to make the cost of safety unreasonable. In this effort we truly were trying to make it easier for a PMA applicant to obtain those PMA's, thus introducing more competition into the marketplace, not less. We fully agree with your statement that we cannot be totally insensitive to the costs. When we issue a rule and it is going to cost this economy a lot of money, more than the safety we will derive from the rule, the rule should fall on its own weight. That is really what is behind the economic analysis we do under Executive Order 12291. We agree with you on that.

Mr. **Ireland**. What you are saying to me now is the opposite of what your statement says.

Mr. **Beard**. No, what we are saying in the statement is that the FAA does not regulate the price structure of either the PMA applicant or the OEM.

Mr. **Skelton**. Excuse me, Mr. Chairman, but it must have a direct cause and effect or at least an indirect cause and effect because my goodness, if you look at the charts, it is outrageous what we are having to pay.

Mr. **Beard**. I saw the charts. I question the credibility of the charts. I am not an expert though.

Mr. **Skelton**. I would suggest again, Mr. Chairman, that this gentleman not only come back and see us the first week in September if that is a convenient date.

Mr. **Ireland**. We will consider the request.

Mr. **Skelton**. Let him find out about the credibility of those figures that have been proposed as accurate figures. I am deeply concerned about this and it appears to me that you are tending to wash your hands and say you don't have anything to do with it, sorry.

Well, you do have something to do with it. I am really concerned about it. I am concerned about your attitude as much as anything.

Mr. **Beard**. From the cause and effect sense, we do.

Mr. **Ireland**. You just said that in direct contradiction of your testimony and your response to Mr. Skelton's question. I am focusing on that regulatory flexibility analysis, an economic impact analysis which, as I said before, should have been done before. Mr. Skelton wants a report on that specific part of it so that we know for the first time that you have some understanding there is a real world out there outside the FAA.

Do you consider that the DOD uses the prerequisite of your PMA approval in its consideration of purchasing parts? In other words, does PMA approval have anything to do with whether the DOD gets a part? They go out and shop around to obtain parts.

Mr. **Beard**. They do something entirely different. In fact, in some cases I hate to use the word "bogus" part because it has a different definition for everyone who uses the term, but they may buy a military version which is similar to a commercial version. Some of the parts may be identical to the commercial parts.

Mr. **Ireland**. They don't rely on any parts approved by you?

Mr. **Beard**. Not to my knowledge, not at all.

Mr. **Ireland**. I think that would be worth looking into. Also, I assure you, Mr. Skelton, I think the GAO will look into the parts question too, and that might help.

Before we get to some more detailed questions, I was delighted that you came forward, and acknowledged that the safety issue was not part of this.

How many legal tests have there been, Mr. Faberman, and what has the outcome of those been? The tests are those which have Mr. Beard so concerned.

Mr. **Faberman**. There have been no legal challenges to the rule or the policy.

Mr. **Ireland**. To the policy of 1972, 1974, 1975? I do not see exactly what it is. That is this general policy that will be codified. Is it a 1972 policy?

Mr. **Beard**. That was 1975 policy, Mr. Chairman.

Mr. **Ireland**. We are going to get that codified so we can dodge all these terrible court cases coming in that Mr. Faberman has just told us there have been none of.

Mr. **Beard**. We did receive informal—this is from the attorney of Avco-Lycoming, which challenged our application of the rule. This is the second time it happened.

Mr. **Ireland**. I am not talking about this rule, I am talking about the period of time since 1975. What happened in 1976, 1977, 1978 with all these people lining up at the courthouse to file suit?

Mr. **Beard**. We responded to that in 1974 by responding that we would codify existing practice in the regulation.

When we get into measuring the increase or decrease in burden of our proposal, what we intend to measure it against is the burden that is inherent in the system today for issuing PMA's. It is a negative burden from that base line. It is a very negative burden.

Mr. **Ireland**. I will talk later about the burden. What I am talking about is that we substantiated that the hue and cry in this testimony about all these terrible court cases. There have not been any, right? Is that correct?

Mr. **Beard**. On this particular rule, no.

Mr. **Ireland**. No, no, based on that policy. You said the reason for the rule was that somebody would have a test case on your policy that you have now told me was 1975, and this would be destructive to the entire industry and the world would come tumbling down and all I have asked is how many test cases and suits have been filed. You said no.

Mr. **Beard**. No, sir; the answer is no.

Mr. **Ireland**. All right.

We are going to recess while we vote on the budget. We will pick up here when we come back.

[A recess was taken.]

Mr. **Ireland**. Hopefully, when you do your economic analysis, you will realize what economic analysis is all about. To me this is one of the great rewards of the Regulatory Flexibility Act.

I wonder if you would elaborate upon how you expect a PMA seeker to be able to put those markings on if the OEM won't give them to you?

Mr. **Beard**. We, quite frankly, don't expect them to be able to. What our rule actually was asking for was for the part number and if that part number included a drawing revision designation to accurately identify the part, then we would expect that part number to include that designation.

Mr. Chairman, I think to explain that comment, one has to understand the normal drawing control practices in the aeronautical industry of the United States today. Generally, a detailed part will be detailed on a single drawing and the drawing will generally have a drawing number. That drawing number will generally correspond to the part number of the part that is described there. When the drawing is revised because the part has been revised, it is due to a change in heat treat or maybe a change in alloy or some other critical factor. It is not uncommon to alter the part number by also saying this is part 5869A versus part 5869B. Quite often those part numbers are changed to correspond with the drawing designation; that was what we were seeking.

We believe that the intent of the rule can accurately be reflected just by simply asking for the part number so the mechanic knows that, yes, sir, this part number is eligible to replace this part.

Mr. **Ireland**. But you have not answered my question. The PMA may not have that revision number.

Mr. **Beard**. If he does not know what part he is designing, that it is identical to, I don't know how he could do it.

Mr. **Ireland**. On the other hand, you say that traceability is so important to you yet you don't have the OEM put that latest revision mark on it. How do you know that he did not give you one that was not revised?

Mr. **Beard**. The OEM does mark a lot of their parts. In fact, not all of it.

Mr. **Ireland**. Under this they don't even have to.

Mr. **Beard**. The OEM works under the burden of the assumption that any part that is not marked to the contrary is an OEM part. And they find themselves in a lot of legal liability cases because that assumption prevails.

Mr. **Ireland**. Well, why would you not require it of them as well as the others?

Mr. **Beard**. We do require it. They publish parts catalogs.

Mr. **Ireland**. Wait a minute. You don't. It is not even in here.

Mr. **Beard**. No, the specific regulation, FAR 45.15, only addresses the PMA, the total FAR 45 addresses the marking of all parts, including parts made by OEM's.

Mr. **Ireland**. Which does not have that revision in it so the OEM does not have to put it on, that is what I am driving at.

Mr. **Beard**. If the OEM marks his parts with a part number, that part number would include a revision number.

Mr. **Ireland**. Yes, sir, but he is not required to like the PMA.

Mr. **Beard**. I guess I am having difficulty because I don't have a typical drawing system to demonstrate my point.

Mr. **Ireland**. Let me ask you this: OEM puts out a part. He obviously does not have to have a PMA. He is under your system.

Mr. **Beard**. He has a production certificate, yes, sir.

Mr. **Ireland**. Under that he is not required to put the latest revision markings on it. Am I correct?

Mr. **Beard**. He is required to give each part——

Mr. **Ireland**. I just said is he required to put the same revision markings on it that a PMA holder making the same part would do?

Mr. **Beard**. In effect, yes, sir, Mr. Chairman, he is.

I was trying to get to that conclusion through a lengthy explanation but in effect, yes, sir, it is the common aeronautical practice.

Mr. **Ireland**. I want to know, is he required to put it on there?

Mr. **Beard**. In effect, yes, sir.

Mr. **Ireland**. Not in effect. Is he or isn't he?

Mr. **Beard**. I will say——

Mr. **Ireland**. You are building a tremendous credibility gap for yourself and your whole administration.

Mr. **Beard**. He is required to identify all his parts. The part is identified by part number.

Mr. **Ireland**. Well, you have destroyed your credibility as far as that is concerned. He either is or he isn't. You say, well, effectively. If the Moon is full and it is an alternate Thursday, maybe he is or maybe he isn't.

The question is, "Is he, or isn't he," and your answer is a hedge.

Mr. **Beard**. I'm sorry that you take it that way because I don't believe it is a hedge.

Mr. **Ireland**. Well, the thing that I want you to address as you move along here and take into consideration is what you obviously have alluded to in saying that it certainly was not your objective to be anticompetitive. You might spend a little time figuring out whether there is an adverse burden to these PMA's to get this information. It does not take a very astute person to figure out that there is a problem there and the fact that you have just discovered it is pretty enlightening to us.

Mr. **Beard**. Mr. Chairman, I believe I can respond to that point.

Since 1975, we have required all the PMA applicants who are claiming identicality under the provisions of the existing rule to identify the part number, to include the drawing, to include the drawing revision date, to include the drawing revision letter. That is the policy today.

We are relaxing from this in this NPRM, not increasing it, and we have advised Superior Air Parts not less than a year ago when they first raised this to us that we were willing to reconsider that language. The way they were interpreting that to the aviation community was inconsistent with what we said in the preamble and inconsistent with what we intended; they have known that for over a year.

Mr. **Ireland**. I think we have examined that to our satisfaction.

You talk about this data base that you have that is so wonderful. I wonder why you don't give some consideration to perhaps notifying those people that you have on your data base what is going on.

Mr. **Faberman**. Mr. Chairman?

Mr. **Ireland**. That was a statement of mine, not a question. I am going to ask the subcommittee staff director, Mr. Lynch, to run through some questions. This should make it go faster.

Mr. **Lynch**. Thank you, Mr. Chairman.

To clarify some of what you told us, identicality existed before 1972, it just was not codified; is that correct?

Mr. **Beard**. I believe we said before 1974. In 1974 it came in to become about 1966 with the advisory circular.

Mr. **Lynch**. I am interested in your comments about the controversy over the years that resulted from various attempts to codify PMA regulations.

Have the PMA's as a group ever come to the Federal Aviation Administration and asked for either a rulemaking at the national level or a major resolution of differences or, in each instance where this has occurred, has it been the OEM's who approached the agency?

Mr. **Beard**. I am taking time to get the right answer so I don't confuse it.

As a group, no. We have heard a lot from Superior Air Parts, that is 1 PMA out of 700.

In about 1974, an OEM challenged the application of the existing rule. They read it literally and we were applying it in a different way. They were legally right and our chief counsel made a ruling on that. As a result of that ruling, it became very difficult for a potential PMA applicant who does not actually manufacture the parts to obtain a PMA.

We gave very high priority to a rule change effort at that time so that people such as Superior Air Parts could obtain a PMA for parts that were actually being supplied to them. I believe that rulemaking probably moved, in my experience, faster than any rulemaking I can remember there.

Now, I don't remember whether they actually petitioned for that rule change or whether we went off on our own initiative. There was a disagreement, so to speak, between the technical side of the house and the legal side of the house and it really was not a disagreement because the legal side of the house said, look, we are not making a safety judgment on this issue. We are just telling you how the rule reads. If you want to change that rule and it is your safety judgment that it can be changed, then do it, and we did it.

In answering your question, I don't know whether that was self-initiated, whether it was a petition for a rulemaking, or whether they occurred simultaneously, but it was handled very expeditiously. That is the "Dear George" and "Dear Jerry" letter exchange that was referred to.

Mr. **Lynch**. I am glad you brought that up because I was going to.

In your actual statement that letter is not really mentioned. However, in the response to the questions we sent you, you say the genesis of NPRM 77-19 is traceable to an October 1977 letter request which is what we are discussing?

Mr. **Beard**. Yes.

Mr. **Lynch**. Just to make sure we have the facts correct, that letter was written on behalf of an OEM to the new FAA general counsel by an individual who had just left the FAA as general counsel. Is that correct?

Mr. **Beard**. That is correct, I believe.

Mr. **Lynch**. Concerning those letters, I understand the issue which you have just discussed concerned whether someone manufactured the parts or not. Should an OEM get a type certificate if they are not going to manufacture the part? What is the difference?

Mr. **Beard**. The certificate is a design approval that includes all of the detailed parts so each detailed part does in fact receive an FAA design approval. The OEM then obtains a production certificate which says you have a quality control system that will insure that the parts you manufacture are in conformity to the type design. When you are dealing with somebody like a major engine manufacturer or aircraft manufacturer or major helicopter manufacturer, you have these two separate things, a type certificate and a production certificate.

For the PMA, a PMA authorization is really a combination of those two concepts scaled down for the small producer of individual parts. It includes the design approval and it includes the quality control system.

Mr. **Lynch**. Is it true, as was alleged in our earlier hearing, that a lot of OEM's do not actually manufacture the parts? They are manufactured by a subcontractor who in some cases is the same subcontractor who manufactures parts for a PMA?

Mr. **Beard**. That has been our experience, yes, sir.

Mr. **Lynch**. Again, going over your statement where you discuss October 31, 1975, and what happened because of FAA field practices. I am not sure whether something is left out there but let me make a statement and see if it is accurate.

It is our understanding the Southwest Regional Office in the June 1975 memorandum required PMA applicants to submit a copy of the FAA-approved type certificate holders drawing. Now is that what happened and is that why the later policy memorandum was issued, to clarify that?

Mr. **Beard**. I don't have a copy of that June memo from the Southwest region but that was consistent with the national policy before the policy change in October 1975. That was after the rule was codified to read as it does today.

We considered the only legitimate way at that point for a PMA applicant to actually prove that his design was identical was to bring in his source of information to show us that he knew what the OEM's design was. He had the data; there it is. Not only the drawing but heat treat specifications, surface specifications and everything, and his data was in fact identical to that. We abandoned that policy without a rule change and what we simply said is, if you bring us your data and you very explicitly identify the OEM data, then we will go find that at the OEM's place, saving you the problem of bringing in that data. That was the change in policy that occurred in October 1975.

A June letter from the southwest region preceded that. If it says they have to bring in the OEM's data, then that would be consistent with the prevailing national practice at that time.

Mr. **Lynch**. You have told us that 77-19C is a proposal to codify Federal regulations as set forth in the national guidelines, et cetera. How come that was never stated in either of the notices of rulemaking? I have read through both of them, and I never saw that statement made.

Is someone just supposed to infer that this is what is happening? Am I correct that it is never actually stated?

Mr. **Beard**. That is an unfortunate deletion. I think it was a little more clear in 77-19. In 77-19C, it was clear that that is just the one in a series of NPRM's. The region such as the southwest region did disseminate letters after we made the policy change in October 31, 1975, on all PMA holders that were making this change and we felt that it would be ready.

Mr. **Lynch**. So I did not miss it?

Mr. **Beard**. No. It should have been more explicitly stated. I believe we alluded to it by saying we are trying to standardize the national practices amongst the regions. There are a lot of differences.

Mr. **Lynch**. I will quote you from your statement: "We are seriously concerned about the market flow of unapproved parts."

Could you cite to me in all the various notices of the 77-19 series where that statement is ever made by the FAA?

Mr. **Beard**. I don't believe we did in that series.

Mr. **Lynch**. Do you believe that should have been stated in any of the notices?

Mr. **Beard**. In retrospect, to help us at these hearings, yes, sir.

Mr. **Ireland**. Wait a minute. We are not doing things just to help at congressional hearings. Perhaps you had rather restate that. We are supposed to be doing this for the American public, not for some bureaucratic assistance.

Mr. **Beard**. Absolutely. The people that we were communicating with in the NPRM's were people who were in the spare parts business and in the aircraft manufacturing business and there were a lot of things that we probably did not state in those NPRM's that we felt would be clearly understood because of letters they were given copies of.

Mr. **Ireland**. This flies in the face of a big problem you are already aware of. These people don't ever know what is going on in your operation.

Mr. **Beard**. Oh, yes, I can give you a copy of a letter.

Mr. **Ireland**. Our records are full of these things. You sit in your ivory tower, and slap something in the Federal Register and think everybody knows about it. The American public is tired of that kind of operation.

Mr. **Beard**. We agree. The Federal Register is not good dissemination. We presently have a mailing list of nearly 5,000 people who we mail copies of our notices to when we propose to change FAR.

Mr. **Ireland**. Well, you can check our records and increase the number of that mailing list by quite a bit.

Mr. **Beard**. We constantly invite people to get on the mailing list.

Mr. **Lynch**. We have reviewed the entire docket, as you have, and we have looked at comments from the Justice Department, the SBA, PMA's, and even OEM's which all seem to state that they believe fewer companies will be able to get PMA's under this regulation mainly because of the drawing requirement. I would like to ask you why, in your statement, you seem to believe exactly the opposite of that, and in fact say that a market will open up and many more people will come in. I don't understand the discrepancy?

Mr. **Beard**. We have met with SBA on that subject. They sent a letter to us, I believe on November 4.

Mr. **Ireland**. Wait a minute.

You did not meet with the SBA. Why do you, in your wisdom, think in the face of all this that there are going to be more people doing it when you have not substantiated that in your testimony?

Mr. **Beard**. Because we have an intimate knowledge of the baseline burden that exists in today's system and what we are doing is comparing our proposal with the existing system.

Mr. **Ireland**. We have not had the first person come up here and say it will be easier for them to get a PMA. You are saying that there is a great universe of these people just ready to beat on the door when they have to put these revised markings and everything on there about the revision. Now answer our question directly: Why is it you think a lot more PMA applicants will come in here and ask for them?

Mr. **Beard**. Because we know what the burden to them is today, and we know that this proposal is to reduce that burden.

Mr. **Ireland**. How can it reduce the burden if you are making it harder for them to get the information?

Mr. **Beard**. What we require today is more than what this proposal would require.

Mr. **Ireland**. It is not the amount. It is the availability of the information. You can have one criteria, if the guy can't get it he is done, and you never addressed that. We are not nincompoops up here.

Mr. **Beard**. We do address that. In fact, we quote in our statement the policy that has prevailed.

Mr. **Ireland**. How many manufacturers from the littlest to the largest of these items have come running to you and said if you only had this revision marking requirement, we would be able to get in there and get this done? From what you said in here, none.

Mr. **Beard**. What we said in the preamble was that our intent was only to have the PMA applicant identify the part number of the part that he is making an identical part for.

Mr. **Ireland**. You have said nothing to substantiate in your conversation now or in this testimony that there are people out here in the wings waiting to get in. You have not communicated with people along that line. You have nothing to submit to us along this line. You are again out in the fog making these decisions. We want to know how you came up with that. You have a spurious argument here.

Mr. Beard. Mr. Chairman, as I said in my testimony, a lot of it is based on my own personal experience. When I was working with Mr. Manhan trying to get PMA's, it was a horrible burden, and we discussed it with him at that time. Would it not be nice if we could simply trust the certification?

Mr. Ireland. Is it available to him, yes or no?

Mr. Beard. In cases yes, and in cases no.

Mr. Ireland. What?

Mr. Beard. If he does not know the design, he should not get a PMA and many times the design is not available to him either.

Mr. Ireland. They have been able to get approval up until now and, you have had no safety problems, no problems whatsoever. What about the drawing number?

Mr. Beard. He has always had to produce that before. He has always had to give us the drawing number, the drawing revision date, the drawing revision letter. He has always had to do that for us.

Mr. Lynch. Here is where I am confused. Let me make a statement and you respond. Under 77-19C, a PMA applicant must submit all the design data now required plus the drawing revision designation. Is that true, or is it not? If it is true, how is the burden reduced?

Mr. Beard. The burden is reduced by us, reducing it to just the identity of the part number. Now our knowledge is that part numbers typically include either a dash number or a letter number that corresponds to the change in the original design of that part. Quite often those changes are critical to safety; that is all we have asked for.

In existing policy he not only had to provide us with that in the revision letter, but the current data of the drawing. He had to provide us with a complete description of the drawing number, and the revision of it.

Mr. Lynch. So under this regulation he would not have to submit all that?

Mr. Beard. That is correct. All he has to do under this regulation is to tell us what part it is identical to and give us a certification that it is in fact identical in design and he will get his PMA provided he has the quality control system to support it and manufacture it.

Mr. Lynch. Then following this, is this reducing FAA's burden as well?

Mr. Beard. Yes, sir, it certainly will.

Mr. Lynch. You sent out a questionnaire on this subject to the FAA field offices? I read, for example, the Los Angeles office seemed to feel that this proposal will increase their burden a great deal?

Mr. Beard. No, I have read that and I believe it is quite clear that they recognize it will reduce their burden. In fact, they think it is so unburdening that some of the offices are accusing us of giving away the PMA program.

Mr. **Lynch**. "Manufacturing inspection specialists and associated clerical duties will increase significantly with implementation of proposed new FAR 21.302(a)(3)." That is from Mr. Karnowski.

Mr. **Beard**. That is one comment from one office.

Mr. **Lynch**. Well, it is from the Los Angeles office that I just mentioned.

Mr. **Beard**. There is a Los Angeles office and a Long Beach office. It is the Long Beach office that is really handling the Execuair parts.

Mr. **Lynch**. I am not worrying about the Execuair parts. I am worried about this rule and the world. How many offices disagreed with you?

Mr. **Beard**. Not many.

Mr. **Ireland**. How about providing us with a number? You are supposed to be running this and we get in, well, maybe some of these and some of those. This is pretty important. How about getting us some figures on who did and who did not.

Mr. **Beard**. We have those figures in the survey that we provided to the committee.

[Additonal response follows:]

One other negative comment from the Southwest Region was received in response to the questionnaire.

Mr. **Lynch**. If I could touch upon a question we asked the administrator, he responded but he really did not answer the whole question. We asked the administrator about a comment that the Justice Department had made concerning the safety record since safety does seem to be popping up now and then. In fact, I will read you the exact quote we asked him to comment on from the Justice Department.

The Justice Department said:

> While the comments of the original equipment manufacturers such as, suggest that the tighter quality controls are needed in this area, the record as developed to date reveals no evidence that parts manufactured by any PMA holder have ever been recalled by the FAA for safety violations, a claim which few of the OEM's can manage.

Now, in his response the administrator told us that while PMA parts basically have a good safety record, that was not accurate and, in fact, a search of the records for the last 10-years, I believe, indicate that there have been several directives against the PMA parts.

Now my problem with the answer is, what about the OEM's? Is their record as good, better or worse for the 10-year period?

Mr. **Beard**. I would say the record is the same.

Mr. **Lynch**. Can you submit that record? In that 10-year period how many directives were issued against the OEM's and how many against the PMA's?

Mr. **Beard**. OK.

[The information requested follows:]

Within the last 10 years, 58 Airworthiness Directives (AD's) were issued against PMA's and 2,238 were issued against manufacturers other than PMA's.

Mr. **Lynch**. Do existing regulations set a single standard for all FAA regional engineering offices?

Mr. **Beard**. I will admit to a lot of innovation in the field level. We attempt to.

Mr. **Lynch**. Do you need a regulation to correct that?

Mr. **Beard**. No, sir, you do not need a regulation. We do need to apply the regulations as written and if we are going to apply another practice, we need to get that codified in the regulations so all can live with that practice and benefit from it.

Mr. **Lynch**. Well, if innovation exists now in some offices under present regulations, why can't one assume that if new regulations existed there would still be some innovation.

Mr. **Beard**. The point that we stabilized to in 1975 was a result of working through meetings with the field offices. I believe we gave you an extensive record of a Telecon where we got them together and we were attempting to stabilize it. There are a lot of different ways to get design approval for APMA. For the identicality case, we do have stability against the 1975 memo to the best of our knowledge, and we have been checking with the regions to find if any today feel like they need to deviate from that for any reason.

Mr. **Lynch**. So the new regulation would not affect that stability?

Mr. **Beard**. No, the new regulation would put it in the regulation. What we did in 1975 was, we issued a regulation without the benefit of rulemaking and that was wrong. I am the first one to admit it. I did not have any part of it, but I am the first one to admit that that is wrong. That is inconsistent with the Administrative Procedure Act and inconsistent with good Government. We have been trying to correct that ever since we issued NPRM, 77-19 in 1977.

Mr. **Lynch**. Why is the section concerning falsification of applications, reports, and records, so harsh? You have gone beyond the United States Code as it stands now to cover falsification records. You have gone beyond that and have said any violation by falsification whether it is simple error, a wrong date, a wrong name could lead to this punishment which would lead to the loss of all FAA approvals over perhaps one mistake.

I guess my question is, why do we need to go so much further when the United States Code already covers the problem? I think now it is a $5,000 fine and/or 1 year in prison. But you want, in addition, to add more penalties.

Mr. **Beard**. We did refer to fraudulent statements and intentionally false statements. We did not refer to administrative errors. It provides a course of correction less severe than going to the criminal statutes. The regulation that we proposed in FAR 21 was equally applicable to OEM's. OEM's obtain the type certificates. They obtain the production certificates under those procedures. They obtain the airworthiness certificates under those procedures. We are looking to less involvement in the certification process and giving more credibility to industry from the PMA applicant on up. The proposal we made is applicable to anybody who seeks any kind of certificate under 21. It is also analogous to what currently exists in somewhere between five and seven existing FAA regulations.

For example, in FAR 43, which deal with maintenance performance standards, it says who can return the aircraft to service after maintenance and alterations. It affects manufacturers who have their own maintenance facilities. It affects repair stations. It affects airlines. In there you will find something very, very analogous to FAR 21.1, which says if you return an aircraft to service and you make an intentionally false or fraudulent statement, if you hold PMA's we can take them away from you and the supplemental type certificates away from you.

It is analogous to what we have to the certification regulations and analogous to what we have in the pilot school certification regulations. It is not unprecedented. We picked it up in 21 to give us an opportunity to put more credibility in certification statements and to back away from the amount of involvement.

Mr. LYNCH. Yes, but I read through the docket and there have been a lot of comments on this section. The problem seems to be that PMA holders are not exactly sure what you mean by fraudulent, and what type of error could lead to that punishment.

Mr. FABERMAN. We have looked at those comments and we believe that some of those comments have raised questions which must be addressed. The final rule will either change the regulation or respond directly to those comments. The comments were made and some of them were very valid on that point.

Mr. LYNCH. Mr. Beard, I read through both dockets and you have been through them. I think it is fair to say the comments are overwhelmingly at issue with the rule. Quite a few PMA's have commented on this rule. More PMA's have now come forward through the Airline Service Associates. Whether right or wrong, for the most part these people do not understand this rule and are opposed to it. Don't you believe, as a result, that there has to be some misunderstanding here? It really seems that you understand what you are doing but there are few other people who do.

Mr. BEARD. Thank you for that question.

Yes, sir, we have gotten good comments in the docket, good constructive comments that would help us in applying the language either of an adopted rule or the revised NPRM.

As I mentioned before, one of the alternatives we have to consider is to renotice. That is just one of them. The majority of those who have just opposed, without substantive comments, occurred subsequent to a newsletter published in May, provided to us by Senator Tower, to the industry and the comments reflect the concerns of that newsletter.

Mr. IRELAND. Mr. Topping, do you have any questions?

Mr. TOPPING. Mr. Beard, you indicate that in summary, when you are going to issue a final rule result you will allow time for informed public comment before permitting the rule to go into effect. That means after you issue the rule, people may still comment and you will listen and make changes?

Mr. BEARD. Yes; we may make changes, if we have really missed the mark. Our intent here is to delay the effective date of that rule should we decide to go and adopt a rule, and I am not predicting that that is what we will decide to do. Should we decide to go and adopt a rule, we would put a lot of lagtime between the date of adoption and the date of effectivity. We would publish the Regulatory Flexibility Act analysis. We would let people see what it is we think we have finalized on as a result of their comments and what we have learned from their comments, and give the regulatory flexibility analysis; and should we get comments that really tell us we are off our mark, we have a chance to null that rule before anybody is affected by it.

Mr. TOPPING. Thank you.

Mr. IRELAND. Mr. Beard, a closing question or two.

Do the OEM's comply very well with the FAA request to cooperate in PMA application processes?

Mr. BEARD. Generally, no.

Mr. IRELAND. What do you do about it?

Mr. BEARD. Let me tell you what I have done about it. I have written a letter to one. I told him that if he did not give us access to the data, we would then require him to keep his data in the regional office and he did not want to do that.

Mr. IRELAND. If you are so interested in economic activity and so knowledgeable about it, which we find is perhaps not true, maybe we better get something in your rulemaking that will make these people see you can do more than just write them a little letter and say, "Please, please bring your plans in." Don't you think that would be important to do?

Mr. BEARD. We have that rule on the book.

Mr. IRELAND. Well, if you have it on the book, let's go after them and get it done.

Mr. BEARD. That is precisely what I did.

Mr. IRELAND. Your results are not very good.

Mr. BEARD. Oh, yes, they are. I don't know of a single case where we have failed to be able to complete a comparison of data because an OEM has successfully refused to make that data available to us.

The question, Mr. Chairman, I believe is, have they resisted? Yes, they have resisted, but they have not succeeded in the resistance.

Mr. IRELAND. Well, maybe we need a rule that makes that easier. That would reduce a few burdens, would it not? You are reducing burdens, you say.

Mr. BEARD. It does not take long to cite the regulations; then they open the doors.

Mr. IRELAND. One last question about inventory.

You say in your testimony, and I want to make sure this is clear because it was so important to people who have testified. In your view, under the rule in its present form, there would be no inventory obsolescence.

Mr. BEARD. That is absolutely correct. We had no intention.

It has been our practice, if we are issuing a rule, to make it become effective for anything that happens subsequent to the effective date of that rule. In very special cases, when we issue a rule with some retroactive aspects, we make it clear in the notice that we propose this to be retroactive. We did not say that. We did not intend it. We will not issue a rule that would require anybody to——

Mr. IRELAND. Don't you think that creates misunderstanding?

Mr. BEARD. Yes; we will address it. Our action will have an extensive preamble which addresses every comment.

Mr. IRELAND. The reason I do that is to demonstrate to you that in doing these things you have to have some understanding about the people you affect. You have just shown that there is a common communication operation and you ignored it, which tells me that you are not—no matter what you say—in communication with the people that you regulate.

Mr. **Beard**. No, sir, we would not.

Mr. **Ireland**. Otherwise, we would not have had all these people coming in here misunderstanding your approach.

Mr. **Beard**. If we were to issue a rule, we don't intend to ignore it.

Mr. **Ireland**. What I am saying for the record is that insensitivity of your operation is indicated by the fact that you did not even think this was a problem. I want you to have an idea from this body that we would expect, on behalf of the American people, to have a little bit more responsiveness.

A final comment: The PMA's don't understand this rule. There are some problems that you have already cited in it. I would suggest that it would probably be a good idea to go back to the drawing board. It would probably also be a good idea to make sure that everybody had a chance to comment on a revised rule sufficiently. If you have this data base and 5,000 people on the list, they ought to know about it, and not find out through an industry newsletter.

Mr. **Faberman**. Mr. Chairman, if I might comment on that.

We believe that the FAA and the Department of Transportation have one of the largest information disclosure systems when it comes to rulemaking of any Government agency. We have an extensive mailing list. The Department of Transportation agenda which is required by executive order——

Mr. **Ireland**. Mr. Faberman, we are talking about what has happened. If there is anything that is demonstrated by this hearing, it is that you have, in this particular area, been off on your own. Very few people knew about it and half the testimony that Mr. Beard gave us here is citing all kinds of wonderful, nebulous things that don't even come into play in what we are talking about.

So we are not here to compliment you on what you ought to be doing anyway; that is what the taxpayers pay you for. We are talking about what is in the works and what ought to be done better. To sit there and pat yourself on the back for things that you ought to be doing anyway—which did not work in this case—is not what we are up here to hear about.

One last question.

Mr. **Lynch**. Going back to the OEM problem, this was really not what we are looking for but someone had made a PMA application and the OEM which had the drawing through six different letters tells the FAA first they are not going to comply, and then the FAA tells them "you had better comply." Then they sent a letter where at one point they include their flow chart. In other words, they told your agency this is how we will make the decision whether you get the drawing or not.

What struck me and the reason we brought up the question is, are these people really cooperating, and if they are not, maybe something should be done. I don't understand why a Federal agency has to go through all these letters and flow charts, et cetera, when this should be done. That is why we raise the issue.

Mr. **Beard**. It is the FAA, notwithstanding what Whittaker may have in their letter, that determines whether the applicant gets a

PMA or not. Now, we have regulations which give us access to data. If they resist, that part of the regulations would go in.

I guess that is the point I am trying to make. We have the powers and authority now. If somebody resists us, it is going to take us a couple of letters to get through the door. But we get through the door, and we make the comparisons. I don't know of a case where somebody has been denied a PMA because we have been unsuccessful in capturing the OEM data. I can think of many cases where we come in with an assertion of identicality and when we got to the OEM we found out they did not know what the heat specs were and the surface hardness and the alloy materials were. They were grossly deficient in their applications. In those cases we tell them, you failed.

Mr. Lynch. Well, since this does happen, this can create a problem between the FAA and the applicant and take a lot of time and the issue is not addressed in this particular legislation; maybe it will be later.

Mr. Beard. Yes, it does create a burden because we have false starts in those cases but we still contend if the PMA does not know the design of the part, he should not have a PMA if it is based on identicality. Now we have a lot of cases with PMA's where the PMA applicant does not even assert to know that it is identical and he goes through an engineering evaluation such as the OEM has.

For example, a rudder on a DC-10. A person may come in and say I want a PMA for a replacement rudder on the DC-10, and I will show you that I have a rudder design that will function aerodynamically, will fit in the space, carry the loads, and do everything that Douglas' rudder will do, and meet your FAR's, and here is my engineering test and analysis, and he gets it if he substantiates the same way the OEM does.

Mr. Chairman, I request that my complete prepared statement appear in the record.

Mr. Ireland. So ordered.

We will now adjourn, and thank you, Mr. Beard.

[Whereupon, at 12 noon, the subcommittee was adjourned, to reconvene subject to call of the Chair.]

[Mr. Beard's prepared statement follows:]

Prepared Statement of M. Craig Beard, Director of Airworthiness, Federal Aviation Administration

I am Craig Beard, Director of the FAA's Office of Airworthiness. With me today from the FAA are Harvey Safeer, Director of Policy and Plans, and Edward Faberman, Deputy Chief Counsel. As Director of Airworthiness, I issued the Notice of Proposed Rulemaking being considered in these hearings, that is NPRM 77-19C entitled: "Parts Manufacturers Approvals; Falsification of Airworthiness Certification Documents," published in the Federal Register on January 15, 1981. I also issued revision "D" to that Notice on July 2, 1981, to extend the public comment period on NPRM 77-19C from May 15, 1981, to September 21, 1981. The Office of Policy and Plans, represented here today by the Director, Mr. Safeer, is the FAA Office responsible for completing regulatory flexibility analyses and is therefore the office that has been working with the Small Business Administration (SBA) to develop the FAA's recently published draft "Definitions of Small Entities and Guidance Material for Making Determinations Required by the Regulatory Flexibility Act of 1980." The Office of the Chief Counsel, represented by Mr. Faberman, is responsible for reviewing all FAA notices of proposed rulemaking and final rules for legality and form, and monitors FAA rulemaking procedures to ensure compliance with the Administrative Procedure Act, Executive Order 12291, Department of Transportation policy and other statutes and requirements. We welcome the opportunity to appear before this Subcommittee today to describe FAA's implementation of the Regulatory Flexibility Act in general, and in particular why in NPRM 77-19C I certified for the Federal Aviation Administration that:

"It has been determined that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities."

We also appreciate the opportunity to "clear the air" on a number of general aircraft spare parts approval issues raised by testimony before this Subcommittee on Tuesday, July 27. We will do our best to respond to all questions you may have concerning NPRM 77-19C, to the extent we can do so, consistent with the legal restraints imposed on discussing pending rulemaking activities.

In your letter of July 29, the Subcommittee provided us with a list of specific issues that you would like for us to address. Our responses to each of the questions for FAA staff on the PMA Rule are attached to this statement for the record. The questions for the Administrator were answered in a separate letter from the Administrator.

Mr. Chairman with that introduction, permit me to touch first on the general subject of FAA's implementation of the Regulatory Flexibility Act. We at FAA firmly support the principles of not only the Regulatory Flexibility Act but those envisaged by the public rulemaking provisions of the Administrative Procedure Act, of Executive Order 12291 issued by President Reagan on February 17, 1981, the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979), and of the FAA General Rulemaking Procedures set forth in Federal Aviation Regulations, Part 11 (14 CFR Part 11). We believe that adherence to these principles improves FAA rulemaking by providing increased and more meaningful public participation.

With respect to the Regulatory Flexibility Act, we review all proposed rules both at the NPRM and final rule stages to determine if an initial or final regulatory flexibility analysis is required. Since the start of the Reagan Administration, out of 21 important FAA NPRMs and final rules, only one has required a regulatory flexibility analysis, and that was for a rule with beneficial economic impact for small businesses. The reason so few analyses have been required pursuant to the Act is that the notices and rules that have generally been issued either impacted only a few small businesses or involved limited economic impact. The main thrust of Administrator Helms' regulatory program has been to reduce, without compromising safety, the regulatory burden whenever possible.

The Act requires the FAA to use Small Business Administration definitions of aviation small business unless the agency adopts definitions after consultation with SBA and public comment. To aid agency rulemaking Officials, such as myself, in making appropriate and consistent "Reg-Flex Act determinations," the Office of Policy and Plans, headed by Mr. Safeer, has prepared, through an extensive effort and with assistance from SBA, a draft document entitled "Department of Transportation/Federal Aviation Administration Definitions of Small Entities and Guidance Material for Making Determinations Required by the Regulatory Flexibility Act of 1980." SBA provided us with their written comments on this document on July 22, 1982, and an invitation for public comment was published in the Federal Register on Thursday, July 29. We are quite proud of this effort and sincerely appreciate the kind words in that regard provided by the spokesman from SBA's Office of Advocacy before this Subcommittee on July 27.

Using a combination of SBA's small business size standards, our draft guidance material, and our best judgment, we try to make an objective, honest determination of whether or not a regulatory flexibility analysis is required for an NPRM or final rule. Making these determinations often requires a considerable analytical effort. This effort is in addition to that needed to conduct the economic analysis required under DOT procedures, which is a self imposed check on the impact of our rules that is not done by most other agencies. We try to identify small entities which may be affected by a rule, quantify the costs per entity, and assess the significance of these costs. Over time, we have continued to improve our data on small entities and to refine our capabilities to make meaningful determinations under the Act. We also have begun the long and complicated process of reviewing agency regulations which were in effect on January 1, 1981, in accordance with the Act.

That's where we stand today, one year and nine months after the effective date of the Regulatory Flexibility Act.

At the time NPRM 77-19C was issued, January 8, 1981, the Regulatory Flexibility Act had been effective for eight days. The guidance material, data base, and analytical methodology available to us at that time for implementation purposes was extremely limited. Things had not improved much in this regard by July 2, 1981, when we issued NPRM 77-19D, which merely extended the public comment period, except that by that time I did have the benefit of about 38 submittals to the rules docket on NPRM 77-19C. It was my best judgment at the time I signed the certification statement on NPRM 77-19C and again on NPRM 77-19D, that the proposals of NPRM 77-19C would not in fact have a significant economic impact on a substantial number of small entities. This judgment was based: first, on my intimate knowledge of the true intent of the proposals, having personally had a hand in their writing; secondly, on my 26 years of aeronautical engineering experience in civil aeronautical product design and certification matters, including experience in both seeking and later granting FAA approvals; thirdly, on my working knowledge that most of what was proposed in NPRM 77-19C was either a proposal to codify in the Code of Federal Regulations (CFR) what had been set forth in national guidelines provided by FAA headquarters to the regional offices since 1975, or incidental relaxations therefrom; and, lastly, with this background, on my review of the comments received to that date on the proposal. That was the best data base and methodology we had at the time. Also, as we have repeatedly advised the SBA's Office of Advocacy, because of their particular interest in this rulemaking, we will prepare a final regulatory flexibility analysis, taking benefit of all the information received, before final disposition of the proposal. That fact still stands Mr. Chairman, and we will be pleased to provide this Subcommittee a briefing on our final disposition, and on our evaluation of its impact on small businesses, when it has been completed. We cannot overemphasize that we did comply with the the Regulatory Flexibility Act when we issued NPRM 77-19C, to the best of our knowledge and ability at that time, and that this rulemaking will not be completed without full compliance with the letter and spirit of the the Regulatory Flexibility Act. We continue to be committed to not issuing any PMA rule that will adversely affect small businesses.

But before going further into NPRM 77-19C and related issues, I would like to highlight one other initiative FAA has taken toward more responsible rulemaking. As you know, we deal with safety issues in many of our rules. It is so easy for safety regulatory agencies such as FAA to hold up the "safety" banner to justify rules. In these times, it is becoming increasingly important for agencies such as ours to make a better effort to objectively quantify the safety benefits and measure them against the economic cost to ensure that a safety benefit will be derived which clearly justifies the costs to our economy. The FAA has undertaken two major initiatives to lay down a methodology and to establish a data base to do a more creditable safety benefit—cost analysis in the future. In January 1982, the FAA Office of Aviation Policy and Plans issued a guide for "Economic Analysis of Investment and Regulatory Decisions," to provide guidance on a methodology. In addition, the Office of the Associate Administrator for Aviation Standards, the Office to which I report, is developing a computer-based "Aviation Safety Analysis System," which we call ASAS. ASAS is intended to provide advance computer techniques to assess and analyze data bases to provide the capability to complete these analyses. We are quite proud of these initiatives as they are developing, and we believe they clearly demonstrate FAA's desire to excel in satisfying the principles of the Administrative Procedure Act, as well as the Regulatory Flexibility Act, and Executive Order 12291.

I would now like to return to the general issues of civil aeronautical replacement parts and then discuss NPRM 77-19C in particular.

First, for Congressman Skelton's benefit, let me state that I am aware of no relationship between FAA approval of parts for civil application and military procurement practices. We have seen no evidence that the military services have required civil approval of spare parts nor can we imagine that they would want to. We would not even have a regulatory basis to approve such parts unless they had a civil application. It's true that there are some parts common to both civil and military application but, even in these cases, it is our belief that only a small percentage of military procurements are of this type and those that are, are accomplished independently of any FAA parts approval program, except possibly when the military is dealing with an "off-the-shelf" civil aircraft. We believe that some of the design data that finds its way into the public domain and appears with PMA applications comes from these independent military procurement efforts.

Secondly, to clear another issue raised at the July 27 hearing, FAA does not regulate either the pricing practices of the original type certificate holder—sometimes referred to as the Original Equipment Manufacturer (OEM)—or of the alternate parts source pricing practices. We are sensitive to the issues and surely do not want to adopt regulations or practices that would have the effect of increasing the cost of parts unless there was a compelling safety need for the regulation. On the contrary, as we hope to convince you with respect to NPRM 77-19C, it is our firmly established goal to reduce costly and anticompetitive regulations where we can do so without compromising safety in air commerce.

Mr. Chairman, your opening comments at the July 27 session indicated that you have a clear grasp of the genesis of the FAA's PMA concept and of the need for programs such as PMA to assure the safety of parts from alternative sources. Therefore, I do not want to take the Subcommittee's time on the safety fundamentals behind this concept.

However, in light of some remarks made on July 27 by yourself and witnesses, we do believe some clarifications are needed concerning the regulatory history of the PMA program as we know it today. Significant changes were made to the PMA rule, subsequent to its introduction in 1955, which have an important bearing on understanding the relative impact of NPRM 77-19C. The PMA rule as it is today addresses three basic concerns: (1) design approval of the PMA part; (2) approval or acceptance of the production quality control system under which PMA parts will be manufactured to ensure that the PMA parts are produced in exact conformity with the approved design; and (3) the PMA part marking requirements to ensure proper utilization and source traceability of a PMA part that might have an in-service problem. The central issue of NPRM 77-19C concerns the manner by which the FAA accomplishes its design approval functions for PMA parts. There certainly are other issues in NPRM 77-19C but, for the most part, they all flow from that central issue. To accurately measure whether or not NPRM 77-19C would increase or decrease the burden on the PMA applicants, one must clearly understand existing PMA practices and how they evolved to where they are today. We most emphatically disagree with a previous witness who would have this Subcommittee, OMB, SBA's Office of Advocacy, the Department of Justice, and "members of the aviation industry" (ref Superior Air Parts, Inc., letter of May 18, 1981, in Docket 17147) believe that we are proposing a significant change from what has worked successfully for the past 25 years, and that this change will put PMA holders out of business. To put the "burden issue" in perspective, I would like to recite the evolution of our existing policy and practices for the design approval of PMA parts.

On July 26, 1955, effective August 25, 1955, Civil Air Regulation 1.55 was adopted to provide for persons other than the holder of a type certificate to produce replacement or modification parts for sale for installation on a type certificated product. In 1965, well after the Civil Aeronautics Administration became the Federal Aviation Administration, CAR 1.55 was recodified as FAR 21.303, which referenced other sections of FAR 21. FAR 21.303 was subsequently amended in 1972 and again in 1974 to clarify the rule and to reduce the burden on the PMA applicants. The 1972 amendment is key to understanding the current level of burden in obtaining design approval for PMA parts. The "identicality" concept was first given regulatory legitimacy through that amendment 10 (not 25) years ago.

On August 13, 1969, NPRM 69-36 proposed to consolidate all of the requirements for PMA and the policies applied under old CAR 1.55 into FAR 21.303. The preamble of NPRM 69-36, plus the policy material associated with CAR 1.55, make it clear that at that point in time, it was envisaged that design approval for PMA parts (other than parts made under license) would usually be accomplished by engineering analysis and tests conducted by the PMA applicant with design substantiation data being submitted for the FAA's engineering evaluation. In short, the "identicality concept," as we know it today, had not as yet been codified into the regulations. Again, Mr. Chairman, it's the same as it was just 10 years ago prior to Amendment 21-38 adopted in May 1972.

In the preamble to the 1972 amendment, which emanated from NPRM 69-36, it was acknowledged that through issuance of an Advisory Circular (AC) 21.303-1 in March 1966, the FAA had accepted a practice, without regulatory amendment, of granting design approval for PMA parts, provided among other things, the applicant submitted extensive data substantiating that the PMA part would be identical in all respects to the corresponding part of an approved type design. That 1966 advisory circular also made it quite clear that in such cases, the FAA reserved the right to require further substantiation through tests and analysis to establish that a so called "identical part" met the applicable airworthiness requirements, when in the FAA's opinion the airworthiness of a critical part or design could not be assured by the mere showing of identicality to an approved design. The knowledge that testing may be required as expressed in current FAR 21.303(f)(1), and as envisaged by proposed FAR 21.302(d) of NPRM 77-19C, is traceable to Advisory Circular 21.303-1, i.e., 1966. It's not new.

Amendment 21-38 adopted May 19, 1972, gave us FAR 21.303(c)(4) as it reads today, which relieves the PMA applicant of submitting test reports and computations for design approval provided that ". . . the applicant shows that the design of the part is identical to the design of a part that is covered under a type certificate." Advisory Circular 21.303-1A, issued August 1972, (superseding AC 21-303-1) which is still in effect today, continues to place the burden of substantiating identicality on the PMA applicant—stating that "if the applicant can show that each part that he wishes to have approved is identical in design, material, and processing to the corresponding approved part, the FAA will approve the applicable data." Advisory Circular 21.303-1A continued to make it clear that FAA reserves the right to require testing and other substantiating computations when in FAA's opinion the airworthiness of a critical part or design cannot be assured by the mere showing of identicality to an approved design.

The recitation of the pre-1972 policy evolution shows that our policies in the PMA program seemed to first evolve as FAA field office innovations, followed by a national policy statement, and then codification of a practice in the regulations. Without justifying this method of policy promulgation, I would say that it has occurred because of the difficulties and controversies we have experienced in administering the PMA program over the years. This evolution of policy did not end in 1972. On October 31, 1975, because of FAA field office practices which had begun to evolve and with an interest in further reducing the burden on the PMA applicant of substantiating identically, FAA headquarters issued a policy memorandum to the field offices which led to FAA's current practice of comparing PMA data with OEM data. That policy memorandum provided that the applicant ". . . submit his data to the FAA along with a certifying statement that his data is identical to the previously approved data by identifying the previously approved data completely, by nomenclature, part numbers, data revision and revision letter/number." That policy was established in late 1975 and is our current policy.

In the main, NPRM 77-19, issued in August 1977, sought to codify and give regulatory legitimacy to these existing FAA practices. NPRM 77-19C, which I issued in January 1981, continued that effort to codify existing practices but with further reductions in the burden for PMA applicants by proposing to (1) reduce the time delays associated with pre-approval FAA data comparisons, and (2) limit FAA's prerogatives to call for testing in "identicality cases" to certain precision parts, with examples for guidance. Should this rulemaking fail, or be unreasonably delayed, then the existing field practices for issuing PMA's could come under serious legal challenge. A strict literal application of FAR 21.303 as it reads today would be absolutely devastating to small businesses that might wish to obtain PMA's in the future. Adoption of the rule we proposed in NPRM 77-19C would give regulatory visibility to current practices, providing for more—not less—competition in the spare parts marketplace.

It is our conviction that the rulemaking proposed in NPRM 77-19C will stimulate small businesses to obtain PMA's on parts they now manufacture for OEM's and PMA holders. This conviction is validated by the results of our regional office survey. This increased small business entry into the marketplace was anticipated when we issued NPRM 77-19C and, we believe, may be the reason some existing PMA holders and OEM's have so aggressively opposed this notice.

With that regulatory history as background, I believe it is also important for the Subcommittee to know that first, PMA parts are only a portion of the total replacement parts' universe and secondly, with one exception, that the kinds of parts characterized as typical of PMA parts, by a witness at your July 27 session, are unique and of minor significance in relation to the majority of replacement parts approved under the PMA system. In fact—with the one exception of Execuair which I will come back to later—I would characterize the testimony on July 27 as a continuation of the "McCoy vs Hatfield" feud between one particular and unique PMA holder and the OEM, with FAA in the middle. The picture painted by this feud is nonrepresentative of the total PMA universe.

On July 27, I provided the subcommittee staff with a copy of a very thick computer generated PMA listing. As you can see, Mr. Chairman, this document of fine print lists thousands of PMA parts available from hundreds of PMA holders. A quick review of this document will show evidence that the PMA program covers a wide range of parts including many that are critical to the safety of large transport category airplanes. The first witness on July 27 handed you some simple replacement parts for a reciprocating engine, exhaust valve guides if my memory serves me right, and represented them to this Subcommittee as "typical of PMA parts." This, in my opinion, is an incorrect representation of the PMA program. However, I am confident that the Subcommittee can and will compare for itself the parts exhibited by that witness against the complete PMA list and reach a correct conclusion on the kinds of PMA parts that are typical. Our rule must address the total PMA universe.

The one exception I mentioned earlier was the so called "simple part made from bar stock," exhibited by Mr. Manhan of Execuair. I believe Mr. Manhan stated "he saw nothing technical about it." While I was Manager of the FAA Aircraft Engineering Division in Los Angeles, as Mr. Manhan testified, that office granted Execuair many PMA's for many small parts that go into critical safety related electromechanical valves for transport category aircraft. Valves which were originally manufactured by yet another PMA holder—Whittaker Controls. Unfortunately, I do not have a cutaway model of a Whittaker firewall shut off valve or engine bleed valve available, but I do have this cut-away of a typical aircraft hydraulic pump. Even though there certainly are differences in design and purpose, both kinds of devices are similar in complexity. Also, since many PMA parts are detail parts for hydraulic system components such as this, I have brought this cut-away model along to make an important point.

This is a cut-away of a variable rate hydraulic pump, which pumps hydraulic fluid at 3,000 psi, operating at 1500 RPM. This is typical of hydraulic pumps used to power the primary flight control systems of major transport category aircraft. These kinds of assemblies and the kinds of valves that Execuair provides parts for are typically made up of dozens of what might appear to a layman to be simple parts—to quote Mr. Manham, that could be made of "bar stock." However, to an engineer, it becomes very clear that we are dealing with high precision, tolerance critical, process critical, parts. If they bind because the tolerances are off; if they wear excessively because of metallurgical inadequacies, heat treating deficiencies, or improper surface hardening process; if they permit metal particles to chip or wear off and contaminate the hydraulic system; if overtolerance leakage rates occur because of improper mating or bad seals, we could find ourselves with a very real in-flight safety problem. We are not talking about a PMA here for the complete pump assembly, even though such could be obtained, we are talking about a PMA for each of these small, so-called simple, individual parts, e.g., screws, seals, springs, slides, bushings, clips, etc. Comparing design data on such items involves considerably more than having a "board engineer" holding two drawings up to the light as was characterized by the ex-FAA engineer on July 27. It's serious business, it's time consuming, and the data, including process specifications, for all these little items comes in large bundles. As a professional engineer, I know of no basis for a statement that there is "nothing technical" about these kinds of parts.

I stated earlier in my statement that PMA parts are only a portion of the replacement parts in the marketplace. Let me explain the other legal sources. First there are the parts from the OEM, i.e., the manufacturers of the original aircraft, engine, or propeller—parts constructed to an FAA approved design in a manufacturer's quality control system which was also approved by the FAA. Second, we allow owners and operators of aircraft to fabricate parts for maintaining or altering their own aircraft, engine, or propeller. We also permit FAA approved maintenance facilities, e.g., repair stations and airline maintenance bases, to fabricate parts to approved designs within their FAA approved quality control system, provided they install these parts on an aircraft, engine, or propeller for which they assume full responsibility for returning to service as airworthy. We also have a Technical Standard Order (TSO) authorization program, similar in process to the PMA program, to provide for FAA approval of appliances and articles of equipment such as seats, tires, instruments, etc.

Our regulations also permit the production of many standard parts such as certain nuts and bolts without PMA, provided they conform to established industry or U.S. specifications. My point is that there are many acceptable parts in service for alternative sources other than the OEM's and PMA holder.

We are seriously concerned about the market flow of "unapproved parts." Many of these unapproved parts may truly be bogus, unsafe, or counterfeit parts. The data is out there, at least a sufficient level of geometrical data, to cut out look-alike parts. Unfortunately, we are also aware that many vendors or suppliers to prime manufacturers, small businesses for the most part, contribute to the flow of "unapproved parts"—parts which are often safe and of very high quality, but unapproved just the same. Before we can get an enforcement handle on the truly unsafe bogus parts, we must reduce the quantity of unapproved parts. One way we had hoped to do this is to make the PMA rule less burdensome for potential PMA applicants, many vendors and suppliers to OEM's and even PMA holders, who know and would be willing to certify and stand fully responsible for the identicality of their product design to an already approved design. That, Mr. Chairman, is the safety issue involved in NPRM 77-19C.

As was repeatedly stated in the preamble of NPRM 77-19C, the proposal was intended to relieve the regulatory burden on the PMA applicant for parts which the applicant knows are identical in design to an already approved design. As I mentioned earlier in my statement, if the words in the existing PMA regulation of FAR 21.303(c)(4) were applied as written, the PMA applicant would be required to "show" identicality.

The policies mitigating the burden of FAR 21.303(c)(4), set forth by our memorandum of October 1975, were objected to by an OEM on the grounds that they were inconsistent with prior and more proper regulatory interpretations. To publicize this new relaxed policy, we proposed NPRM 77-19 to codify the policy guidance of this 1975 memorandum in our rules. When we were considering disposition of NPRM 77-19, one option considered was to withdraw the notice and terminate further rulemaking on the subject altogether. That option was rejected by me because of my concern that it could lead to a legal challenge of the 1975 policy. Should that policy be overturned by a legal test, such a consequence could be devastating to literally hundreds of truly small businesses that would not be able to obtain new PMA's because they could not "show" identicality. They could also have the legality of their existing PMA's placed in question. Moreover, from a safety point of view, this could certainly lead to an upsurge of "unacceptable" blackmarket parts, and a potential loss of safety in air commerce.

I must mention another important consideration that led to NPRM 77-19C—that is the need to hold down Government and administrative costs—costs picked up by the general taxpayer. We have had no significant safety problems on parts that have actually been approved under the PMA process. NPRM 77-19C was issued to reduce burdens. The main burden we were trying to reduce was the burden on the PMA applicant, the burden, among other things, of obtaining OEM data per pre-1975 policies or of waiting for the FAA to do the long, drawn-out detail design comparisons now conducted under the policies established in the 1975 memorandum. A careful reading of Mr. Manham's testimony, particularly his responses to your questions, and his comments to the NPRM 77-19C docket, certainly corroborates the fact that a burden exists on the PMA applicant as well as on the FAA. As I said earlier, I was Manager of the Aircraft Engineering Division in Los Angeles when Execuair really began to get underway in gaining PMA approval for replacement parts for Whittaker valves. They would bring in literally hundreds of drawing sheets on small, but detailed, parts. Design comparison for assessment of identicality involves much more than comparing geometrical descriptions on two drawings held up to the light together. There are matching tolerances, alloy composition, metallurgical considerations, heat treating, surface hardness, surface finish, as well as other critical manufacturing processes, and for many complete assemblies, performance tolerances. Incidentally, we don't consider Whittaker Controls to be an OEM per se; they are a supplier to OEM's and a PMA holder.

In anticipation of one of your questions—yes, I heard the testimony of Mr. Backstrom, ex-FAA employee from our Southwest Region, stating it was generally a simple one-hour task. This may be true because of the unique aspects of Superior Air Parts items, since they are usually manufactured for Superior Air Parts by the same machine shop that makes them for the OEM, on the same tools, using the same manufacturing processes, and often under license from the OEM. He is certainly qualified to talk about these parts because he did many of those comparisons for Superior Air Parts before he retired from the FAA last April. I too worked as an engineer in that office, in fact with Mr. Backstrom, and I am familiar with what goes on at other offices. I can assure you that the PMA burdens in that office are minimal compared to the more significiant PMA activities in areas like Boston, Chicago, and Los Angeles. Mr. Chairman, I believe you can place Mr. Backstrom's statement in proper perspective from the workload identified in the FAA "survey results" provided to the Subcommittee.

Issues were raised at the July 27 session concerning FAA workload. "Why shouldn't FAA continue these detail comparisons?" I believe that was the essence of the question raised by one witness. For the record Mr. Chairman, let me state that even though we are trying to hire more engineers, the number of engineers, inspectors, and flight test pilots actually on board in FAA aircraft certification work is approximately 350. At any one time, I would estimate we probably have on hand about 2,000 plus design approval requests of one magnitude or another. The total Boeing 767 certification activity would only be counted as one of those requests, as would a request for design approval of a simple PMA engine exhaust valve guide. Therefore, to give you a better feel of workload; in fiscal year 1981, we issued about 15 type certificates for the designs of new airplanes, engines, and propellers; we approved designs for over 200 major new variants to models previously approved under existing type certificates; we approved the design of nearly 1,000 major design modifications, custom installations, to existing aircraft in service; we issued over 200 new design approvals for appliances under the TSO program and approved about 300 new manufacturer quality control systems under the TSO program; and we issued eight new production certificates for OEM's and approved 10 production inspection systems for smaller manufacturers of aircraft, engines, or propellers. Well over 13,000 new airworthiness certificates for individual aircraft were approved. The aircraft certification staff is also expected to assist in developing safety standards and criteria, to assist in accident and incident investigations, and to monitor the safety performance of over 20,000 previous approvals of aircraft designs in service and quality control systems in operation. This work was accomplished in addition to the PMA workload which ranged into the hundreds of parts.

At the time we issued NPRM 77-19C, we honestly desired to rely on a certifying statement from the PMA applicant for the true "identicality cases" and have it recognized explicitly in the regulations for public and legal awareness that that would be the principal basis for our PMA design approvals in those cases. As stated before, existing PMA parts have demonstrated a satisfactory safety record and we did not believe this relaxation of the burden in showing identicality would change that fact. Also, this method is directly analogous to how we process design approvals under our TSO program which has worked without serious safety consequences for years. Existing PMA marking requirements presently permit us to trace deficient parts back to their source for corrective action and the new marking requirements were intended to help the maintenance personnel determine when a PMA part was eligible for installation in a particular assembly. Contrary to previous testimony, there was no intent in NPRM 77-19C to remark parts in stock. When we plan to apply a new rule retroactively, it is our practice to say so in the notice—and we did not in this case.

Mr. Chairman, let me summarize where we are in our rulemaking effort. We in the Office of Airworthiness are finalizing our technical analysis of the many diverse comments received.

When this staff work and a regulatory flexibility analysis is completed, a recommendation with alternatives will be presented to Administrator Helms for his final decision. Some basic alternatives are obvious: (1) withdraw the NPRM; (2) issue a further revision to the NPRM 77-19 series in a new NPRM 77-99E; (3) issue a final rule with language changes to ensure the language is clearly consistent with the intent expressed in the preamble portion of the notice and in consideration of the comments received; and lastly (4) issue the final rule as proposed without change. Sub-alternatives will certainly be considered under (2) and (3). A decision on which of these alternatives will be selected has not yet been made by the Administrator.

Let me amplify some on alternative one to withdraw the NPRM. The intent of NPRM 77-19C is to codify existing policy guidance issued to the field since 1974 and, should the NPRM be withdrawn, we would have to consider establishing new policy which would be consistent with the existing 1974 rule. Such policy, we believe would restrict the emergence of new PMA approvals.

Probably the one most controversial issue raised by the commenters related to the proposed requirement for identifying the OEM's part by "part number, including drawing revision designation." Comments were received indicating that, without the cooperation of the original part manufacturer, a PMA applicant may be unable to obtain information such as design revision drawing numbers. Consequently, the commenters argued that the identification requirements were unduly burdensome, would preclude new PMA's and thus would be anticompetitive. Certainly that was not our objective in proposing those requirements. Our objective was to ensure that the FAA had sufficient information to identify the part to be replaced, i.e., the OEM part to which the PMA part was "identical." Although we continue to believe that a PMA applicant must be able to sufficiently identify what part it is that he seeks to replace, given the nature of the comments received, we may have been too specific in describing how to identify the part. Therefore, as one alternative, we are looking at ways for any final rule that might be issued to more clearly reflect the intent expressed in the preamble of NPRM 77-19C. This same observation applies to that aspect of the proposed rule which deals with marking of parts but a PMA manufacturer. There seems to be no argument by that FAA must be able to trace failed parts to their original source for safety analysis purposes.

Throughout this rulemaking process, we have paid careful attention to the public concerns expressed. We reopened the public comment period on NPRM 77-19 on November 25, 1977, at the request of Superior Air Parts, Inc. On April 6, 1978, the comment period was again reopened to allow additional persons and organizations to submit comments to the docket. This was requested by Avco-Lycoming to give them a chance to reply to Superior Air Parts' comments. On January 8, 1981, the FAA re-issued NPRM 77-19 in a "C" revision to further refine the PMA rules in light of comments received on NPRM 77-19. We first denied requests from Superior Air Parts, Precision Air Parts, and Avco-Lycoming to reopen the comment period on NPRM 77-19C because unlike NPRM 77-19, NPRM 77-19C had both a basic comment of three months plus a reply comment period of one month. However, at my direction, after a second request from Superior Air Parts, the public comment period for this notice was reopened by issuance of NPRM 77-19D on July 2, 1981. In short, we have actively sought and listened to the public comments at every step of the way in this rulemaking, and I can assure you that any further rulemaking we may undertake on this issue, while preserving safety, will reflect a sensitivity to these comments. I must add that to FAA rulemaking has had as such opportunity for public participation as this effort. All parties have been given every reasonable opportunity to become involved in this effort.

Before closing, Mr. Chairman, I want to touch again on the subject of a regulatory flexibility analysis for our PMA proposals. My intent when proposing the rule changes, as I have already indicated, was to reduce unnecessary regulatory burdens in the PMA process. Accordingly, I reached the conclusion that a "regulatory flexibility analysis" as defined by the Act, was not required in view of the potential impact of the rule on small entities. Obviously, there are persons who now question that conclusion. Consequently, to assure full public awareness of our assessment of any potential impacts of this rulemaking on persons seeking PMA's, should a final rule result from this rulemaking activity, we will prepare and publish a regulatory flexibility analysis—whether or not mandated by the Act—and will allow time for informed public comment before permitting any rule to become effective.

One last remark, Mr. Chairman. As you know, I was here on July 27 and heard all of the testimony presented that day. I had three persons with me, two staff engineers who are working this project, plus the Manager, Regulatory Analysis Branch. Since July 27, we have studied the prepared statements handed out that day. Additionally, I have personally read and studied every comment in the rules docket. We have neither heard nor read any new comments from these proceedings of technical or economic substance relative to the proposals of NPRM 77-19C that have not already been made to the Rules Docket. All of these comments are being given serious consideration in the staff work being prepared for final decision on this matter.

Thank you, Mr. Chairman, for your patience with this lengthy statement. I believe we share a common goal to protect the interest of small businesses. We would be pleased to respond to additional questions you may have at this time.

Federal Aviation Administration [FAA] Answers to Questions for FAA Staff on the Proposed Parts Manufacturer Approval Rule (NPRM 77-19C)

QUESTION 1

How was this rule initially drafted? In other words, what staff members proposed it and were they directed by a supervisor to study the issue and then draft a rule or did the rule come about in some other manner?

FAA RESPONSE

Notice of Proposed Rulemaking (NPRM) 77-19C was not a new regulatory effort as some would have you believe. It was a second iteration of a rulemaking effort started in August 1977 with issuance of NPRM 77-19. The genesis of NPRM 77-19 is traceable to an October 1973 letter request for a legal interpretation of FAR 21.303, which led to an NPRM and Amendment 41 to FAR 21, plus additional issues raised in that rulemaking and at a public conference in late 1974, followed by a February 1976 request for legal interpretation which questioned an FAA policy change on the field application of FAR 21.303. NPRM 77-19 was issued as a product of the foregoing and in particular to codify, in the CFR, a regulatory policy change on the application of FAR 21.303(c)(4). The policy change was set forth by an FAA headquarters engineering division memorandum to the FAA field engineering offices dated October 31, 1975. The change in national policies on how an applicant could comply with FAR 21.303(c)(4) represented a significant departure from a strict reading of the language of the regulation and the previous policy. One party informally challenged the legality of the policy change and FAA responded that rulemaking would be initiated to codify the policy change, and the complainant elected to drop the issue. FAA proceeded with issuance of NPRM 77-19, among other things, to meet that commitment. The provision of FAR 21.303(c)(4) at issue was that which permitted the PMA application to obtain design approval on the part in question without submitting engineering test reports and computations provided "the applicant shows that the design of the part is identical to the design of a part that is covered under a type certificate." Before the October 1975 policy change, the PMA applicant was generally required to provide a copy of the OEM's previously approved design data along with his own data to substantiate identicality.

The October 31, 1975, policy memorandum advised field offices to accept certifying statements of identicality from PMA applicants thus relieving them from the burden of showing identicality in design in a manner described above, provided (quoting from the memorandum):

"Applicant submit his data to the FAA along with a certifying statement that his data is identical to the previously approved data by identifying the previously approved data completely by nomenclature, part number, part revision date and revision letter/number."

This information would be used by FAA to locate the "previously approved data" identified by the PMA applicant so FAA could do a detailed comparison to confirm identicality.

NPRM 77-19 proposed to codify the above policy in the CFR, which is, incidently, the national policy in effect today. NPRM 77-19C proposed a continuation of past policy, except FAA would relieve the burden on the applicant of waiting for these comparisons to be completed and would relieve itself of the burden of making data comparisons on parts prior to PMA issuance. The Director of Airworthiness decided to issue NPRM 77-19C rather than to terminate the rulemaking started with NPRM 77-19. Had he selected the option of terminating the rulemaking started with NPRM 77-19, the policy set forth in the October 31, 1975, headquarters memorandum may have been subject to legal challenge. A successful challenge to this policy could result in two significant events:

a. The PMA applicant would assume the full burden of showing identicality in lieu of expecting FAA, and the public to rely on a "certifying statement," and,

b. FAA would discontinue the "data comparison practice" which assists the applicant in conforming identicality prior to issuance of PMA's.

The project engineer on the NPRM 77-19C regulation project was a staff engineer in Washington headquarters who had extensive PMA experience in the FAA's Great Lakes Region, an area of heavy PMA activity. He was directed in this effort by the Director of Airworthiness and the Deputy Chief Counsel. Both of these executives had extensive PMA experience in senior level field management assignments. All three had experienced first-hand the burden on PMA applicants of waiting for FAA to complete its comparisons under existing policies, and on the FAA in locating the data and in doing these comparisons. It was also their belief that primary dependence on the "certifying statement" of the PMA applicant, in lieu of requiring the applicant to show identicality, would suffice for safety if the procedure were given legal visibility and public awareness through codification in the CFR.

The testing requirements of proposed §21.302(b) for certain precision parts, was based on the knowledge that quite often when an OEM changes suppliers for the kinds of parts characterized by the parenthetical examples in the proposal, they find it necessary to repeat the certification endurance tests on the parts from the new supplier to work out functional difficulties which arise from subtle differences in production process, even though the design description remains unchanged, i.e., identical. This proposal was considered relaxing because it limited FAA on when it might require testing for design approval for parts presented for approval under identicality procedures, whereas existing §21.303 (e) and (f) could be invoked to require such tests but contain no constraints on the FAA, or guidance to the applicant, on when tests might be required.

The requirements of proposed §§ 21.302(a)(1), 21.302(a)(3)(i), and 45.15 which would require the applicant to know the original part number, including drawing revision designations, would be no more severe on the applicant than the continued application of existing policy as established by the 1975 headquarters memorandum. The 1975 memorandum relieved the applicant of "showing" identicality by bringing in copies of approved OEM data provided, among other things, that the applicant could identify the original part "by nomenclature, part number, data revision date, and revision letter/number."

Again, Mr. Chairman, in assessing the accuracy of previous testimony, we wish to point out that these are the national policies that have been in effect since 1975,—the same policies are applicable to current practices for issuing PMA approvals to Superior Air Parts and Execuair which in effect testified on July 27 that codification of these policies in the CFR as proposed by NPRM 77-19C would create an impossible burden for the PMA applicants.

QUESTION 2

Are you satisfied that you have complied with both Executive Order 12291 and the Regulatory Flexibility Act of 1980?

FAA RESPONSE

The answer is yes to both parts of the question.

Executive Order 12291 did not exist when NPRM 77-19C was issued; however, it did exist when NPRM 77-19D was issued to extend the comment period. The substance of NPRM 77-19C is consistent with Executive Order 12291 because the notice proposes to relieve a regulatory burden on the public. The economic effect would be beneficial while maintaining the same safety objective of the existing regulations.

The true intent of NPRM 77-19C is consistent with the intent of the Regulatory Flexibility Act because it will not increase the regulatory burden on a substantial number of small entities. Further, as stated in answer to Question 1, the proposed rule of NPRM 77-19C, as those proposals relate to the design approval of parts under identicality procedures, would do no more than codify in the CFR policy which has been in effect since October 31, 1975, with incidental additional relaxations.

Since no significant change in the application of existing policy was proposed, there would clearly be no significant economic impact on a substantial number of small entities.

QUESTION 3

How was this rule certified?

FAA RESPONSE

For both NPRM 77-19C and again in the comment period extension of NPRM 77-19D, we stated that "this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. . . ." This was our best judgment at that time and we continue to believe it to be an accurate statement. In both documents, we explained that the reason for our determination was that the rule would relieve certain administrative burdens. We continue to believe that our certification was correct based on the objectives we set out in the proposal. Based on the comments we have received, however, we do recognize that certain interested parties perceive NPRM 77-19C as being burdensome to small businesses. Although we view this perception as a misunderstanding of the intent of the notice, we have decided that if any final rule is issued based on the notice, a regulatory flexibility analysis will be made. It will be completed and made available for public comment prior to the effective date of the rule.

QUESTION 4

Does the rule eliminate data comparison or retain it?

FAA RESPONSE

The proposed rule would eliminate the need for routine data comparison prior to issuance of the PMA. The FAA would rely on the certifying statement of identicality made by the applicant. Data comparisons would only be done if FAA is given good cause to suspect the accuracy of the identicality certification, or in the design reevaluation of a PMA part that has developed a questionable safety record in contrast to the "identical" part produced by the OEM.

QUESTION 5

What administrative burdens are you attempting to relieve at the FAA level and the PMA level?

FAA RESPONSE

We are primarily trying to relieve the burden on applicants of "showing" identicality as required by the existing regulatory language and, with respect to current policies, that is the burden of waiting for FAA: (1) to digest the data submitted by them, (2) to find or obtain the applicable OEM data to permit comparison, and (3) to do the long arduous comparisons of design detail and manufacturing processes necessary to confirm the design identicality assertion made by the applicant. This work also imposes a considerable technical and administrative workload burden on the Government, paid for by the U.S. taxpayer. We wish to relieve that burden as well.

You heard testimony on July 27 from Mr. Al Backstrom, an ex-FAA employee, of his personal experiences which might be interpreted to indicate that these comparisons are never a burden to the Government. Data in the survey results provided to you (see question 8) clearly shows this interpretation to be incorrect. Also, Mr. Manhan's testimony and his comment to the docket shows that his experience is contrary to that of Mr. Backstrom's.

QUESTION 6

How can the rule be a significant regulatory action, yet have no significant regulatory economic impact?

FAA RESPONSE

The word "significant" as used in the statement at the end of NPRM 77-19C, to which you refer in your questions, was used in the very limited meaning of the Department of Transportation's Regulatory Policies and Procedures of February 26, 1979. Under those guidelines, any rule that might be controversial for department review of the action. "Significant regulations" per this limited definition are reviewed within the Office of the Secretary before adoption. The controversy we expected did not concern "regulatory economic impact" or its economic effect on a significant number of small entities. We expected OEM's and at least one large PMA holder and parts distributor to oppose the proposals because it would become much easier for small PMA applicants (their competitors) to gain approvals for PMA parts on an identicality basis. We note that both Avco Lycoming and Superior Air Parts opposed this rulemaking on July 27. Some controversy was also expected because the existing PMA rule, historically, has been considered by many to touch on other competitive and safety issues.

None of this controversy changes the fact stated in the notices, that is, that it was our conclusion that these proposals would have "no significant economic impact on a substantial number of small entities." If this statement later proves to be in error, we believe it will prove to be in error only because it will have a significant positive impact on small entities.

We share this Subcommittee's interest in helping small entities when we can without compromising safety. The intent of the proposals of NPRM 77-19C would do just that.

QUESTION 7

DOT regulations require a stated need for a regulation. Please provide us with a copy of your statement of need.

FAA RESPONSE

Mr. Chairman, there are two compelling needs addressed throughout the preamble of NPRM 77-19C: First, the need to reduce the regulatory burden on the public, and second, to reduce Government costs when this can be done without compromising safety.

Safety will also be served by making it easier for legitimate parts and component manufacturers, many of which are small businesses supplying parts to OEM's and PMA holders, to obtain their own PMA's for items they may now be marketing in noncompliance with FAR 21.303(a). When this is done, FAA can become more effective in its enforcement efforts on the bogus and counterfeit parts manufacturing activity.

There is another need which we have already mentioned—that is to be in a position to continue to defend the current yet uncodified regulatory practices for PMA approval of parts which are identical to OEM parts. I am speaking of practices which have been applied to the two PMA holders that appeared before this Subcommittee on July 27. These are practices which we believed at the time we issued NPRM 77-19C should be codified not only to defend them from legal challenge, but to make it clear in the regulation that they are available to all small entities that have the capability and want to get into the business of manufacturing replacement aeronautical parts under their own PMA.

QUESTION 8

Why did you fail to place upon the record the regional office evaluation you requested on the administrative burden upon your agency created by present PMA regulations?

FAA RESPONSE

The survey was not conducted for compliance with the Regulatory Flexibility Act, as has been implied. It will, however, be helpful in the future in determining the impact of the rulemaking.

The survey in question was initiated after the comment period had closed on NPRM 77-19C and midway into the extended comment period provided by NPRM 77-19D. As reflected in our letter of August 19, 1981, to the field, the purpose of the survey was clearly stated: "We are in the process of evaluating the comments dealing with the identicalness issue raised in NPRM 77-19C."

The survey was, as stated, a part of the FAA internal process for evaluating comments received in the docket. Internal letters and records of internal discussions are not normally docketed because they are not public views. The survey we selected to conduct in our deliberations on NPRM 77-19C is evidence of FAA's sincere interest in not issuing a regulation that might inadvertently create an unnecessary economic burden. Moreover, the information requested, as noted in the cover memorandum, is intended, along with other data developed by the FAA, for use in completing the economic evaluation needed to comply with Executive Order 12291 for the docket. The survey was not made because we had second thoughts on the impact the action might have on a significant number of small entities as has been suggested.

The content of FAA rules dockets is defined by Section 11.11, Federal Aviation Regulations, Part 11, "General Rulemaking Procedures," and does not call for the docket to contain records of internal FAA deliberations, nor need it under the Administrative Procedure Act. However, as you know, Mr. Chairman, the survey results were made available immediately to this Subcommittee when requested. Since the Subcommittee elected on July 27 to make the results available to the public, we have now placed them in our public docket.

The information obtained from the other FAA offices will be helpful in making our final recommendations to the Administrator on that rulemaking, and will be used in completing an economic evaluation, if rulemaking proceeds. We believe this study clearly shows that our field offices believe the proposed regulatory changes would increase the number of new entrants into the PMA program by reducing the burden of proof on them.

QUESTION 9

Why have you not responded to complaints from the SBA Office of Advocacy sent to you in November of 1981?

FAA RESPONSE

On November 5, 1981, we met with representatives of SBA's Office of Advocacy and responded to the concerns raised in SBA's letter of November 4, 1981, even though we did not know at that meeting that a formal letter had been written. The letter was not brought to the meeting and was not received in the docket until November 9, 1981. It should be noted that SBA's Office of Advocacy, in its letter, did not state that FAA's Regulatory Flexibility Act certification in the two notices was in error. It stated that: "This Office has recently been made aware of a number of small entities who seriously question the appropriateness of the certification. . . ."

SBA's letter went on to suggest: ". . . we believe that an initial regulatory flexibility analysis is warranted given the apprehension of severe economic impact expressed by various small entities upon whom this proposal impacts."

These statements were committed to writing before our November 5 meeting with SBA. At our November 5 meeting, it become apparent to us that SBA's comments were predicated primarily on a misinterpretation of the NPRM by a single source—not "a number of small entities" as stated in the letter we later received. Also, after considering its suggestion, we find nothing in the Regulatory Flexibility Act which requires the preparation of an initial regulatory flexibility analysis after issuance of an NPRM because of an "apprehension of severe economic impact expressed by various small entities upon whom this proposal impacts." Such a provision would expose all rulemaking to delaying tactics by a minority of persons with hidden reasons to thwart the rulemaking.

In our meeting with the SBA representatives, we clarified the intent of the proposal to them, and they appeared to understand our reasons for claiming no impact, but expressed concern that the language of the proposed rule was still a problem to them. We tried to assure them that if a rule is issued based on this notice, the language would be revised as necessary to be consistent with the intent expressed in the preamble of NPRM 77-19C. We also assured them that we would do a final regulatory flexibility analysis before adopting any final rule, whether one was required or not. The SBA's reaction was that they thought we were asking them to "trust us." We could promise them no more under public rulemaking procedures and, since the SBA letter was submitted for the docket, considered a written response prior to final decision inappropriate.

To illustrate the disparity of SBA's Office of Advocacy interpretation of the NPRM, one of its biggest concerns is that we would ask a PMA applicant to identify the OEM's part for which identicality approval was sought by "original part number, including drawing revision designation for which the replacement part is equivalent."

We explained to SBA at our November 5 meeting that this reflects no increased burden over current practice as documented by the 1975 FAA headquarters engineering memorandum which called for the previously approved data to be identified completely "by nomenclature, part number, data revision date and revision letter/number." As explained in answer to an earlier question, and as was explained to SBA, this information has always been needed to effect the "data comparison process" because the FAA must obtain the previously approved data from the OEM. However, we also advised SBA that the intent of this language in NPRM 77-19C, as it was explained in the preamble of NPRM 77-19C and even though it evolved from existing practice, was to simply identify the OEM part that the PMA part could safely replace. We further pointed out that, if we proceed with rulemaking without a new notice, we would seriously consider changing the language of proposed §§ 21.302(a)(1), 21.302(a)(3)(i), and 45.15(a)(5) to simply require "an identification" of the specific OEM part which could be replaced by the PMA part.

On March 3, 1982, SBA's Office of Advocacy filed additional comments to the docket on NPRM 77-19C, which contained a lengthy discussion of the intent of several key proposals, as they interpreted it. That discussion did not reflect the information and explanation provided to them at our November 5 meeting. The SBA has done a commendable job in addressing the concerns of small businesses and assisting this agency in implementing the Regulatory Flexibility Act. Any comments of burden by SBA's Office of Advocacy must be considered, though, in light of their misinterpretation of the intent of NPRM 77-19C. Since the SBA's Office of Advocacy comments, as illustrated in the above example, show a significant misunderstanding of the intent of our proposals, it is our conviction that the Office of Advocacy lacks the valid baseline from which to measure the increase or decrease in burden in NPRM 77-19C. With a proper understanding of present PMA policies, I feel confident that SBA will reach the same conclusions on burden that I reached in my certifying statements in Notices 77-19C and 77-19D.

In the cover document for SBA's Office of Advocacy comments of March 3, the SBA requested that the "Administrator consider the relevancy of the attached comments. . . ." It is obvious that the submittal of March 3 was intended as comments to the docket and was treated in that manner. We will respond to all of SBA's comments in the preamble of the final rulemaking action as is our normal practice, and as is appropriate under the Administrative Procedure Act.

Department of Justice has made a similar comment to the docket expressing concern that the PMA applicant would lack the knowledge to provide the explicit information required, which in turn would be anticompetitive. It appeared that the Department of Justice was subjected to the same misinterpretation of NPRM 77-19C as was SBA, and believe the docket shows by the same person. Unfortunately, the Department of Justice did not ask to meet with us nor did we know it had a concern before its written comments were received. However, the above simple change in final rule language, if adopted, would seem to resolve that Department's concerns as well.

QUESTION 10

What are the safety issues involved in this proceeding?

FAA RESPONSE

PMA parts have had a satisfactory safety record so there was no intent in NPRM 77-19C to increase the safety of PMA parts. As was stated in the preamble to

NPRM 77-19C, the intent was to reduce regulatory burden. An increase in safety was mentioned only briefly in the preamble and this comment ties to our belief that it will eventually help us, as explained before, increase the effectiveness of our enforcement actions in dealing with the bogus and counterfeit parts manufacturers.

QUESTION 11

What is your response to complaints that the proposed enforcement proposals are extremely harsh?

FAA RESPONSE

We saw no increased economic burden in requiring truthful statements from applicants for FAA certification. This proposal would apply to all applications for any kind of certificate sought under FAR Part 21, so it would apply to OEM's as well as PMA applicants. Also it is directly analogous to existing enforcement provisions in FAR 43.12 for false entries in maintenance records or reports, in FAR's 61.59, 63.20, 65.20, and 67.20 concerning tests and applications for various airmen and airman medical certificates, and in FAR 143.20 concerning tests and applications for ground instructors. Proposed FAR 21.2 is also somewhat redundant to FAR 13.19, which implements Section 609 of the Federal Aviation Act. Arguments have been made in comments from both PMA holders, OEM's, and others that it should be dropped. Serious consideration will be given to these arguments.

It should also be recognized by all concerned that anyone making a fraudulent statement in order to obtain an FAA certificate or approval would be subject to criminal penalties under 18 U.S.C. § 1001. The regulatory proposals were intended only as an administratively more efficient and less severe avenue of enforcement.

The SBA's Office of Advocacy testified that this proposal could constitute a "death sentence" for the businesses of an offending PMA applicant, which they thought might be too harsh. We would respond by pointing out that a fraudulent or intentionally false statement made by any applicant for FAA approval, including PMA applicants, could lead to FAA approval of a deficient product, which could in turn be a true "death sentence" for the user.

QUESTION 12

Could you provide us with a general commentary on the comments this rulemaking and the prior one generated? Who opposes the rule and who supports it?

FAA RESPONSE

In general, the comments oppose the rule, which is typical of comments received in this kind of rulemaking action. Those who agree do not bother to write. Opposition was received from OEM's who felt the proposal on identicality was too relaxatory. Comments from the PMA industry and users feared it would be too burdensome. Much of the opposition appears to be the result of a "newsletter" distributed by Superior Air Parts which we believe misinterprets the intent of the proposal. We generally review comments received not on a "for or against" voting basis, but rather for their substantive analysis and input. Many constructive comments have been received that are being carefully evaluated in our final disposition of NPRM 77-19C. A discussion of all comments will be provided in the preamble of the final regulatory action if the Administrator decides to proceed. We would also be pleased to provide the Subcommittee with a complete copy of the docket.

OVERSIGHT OF REGULATORY FLEXIBILITY ACT
(Part 2)

WEDNESDAY, SEPTEMBER 22, 1982

House of Representatives,
Subcommittee on Export Opportunities and
Special Small Business Problems,
Committee on Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2359-A, Rayburn House Office Building, Hon. Andy Ireland (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN IRELAND

Mr. Ireland. Good morning.

Small businesses have several unique characteristics which make them especially important to our economy and to our Nation. For one thing, small businesses tend to react to changes in the marketplace more rapidly than larger businesses and are thus in a better position to develop and exploit new ideas. Second, they are labor-intensive; that is to say, more of their dollars tend to go to hire people rather than to purchase machinery. Third, they are often the initial component for entry for people who are entering the job market for the first time, and finally, as small businesses succeed and expand, they broaden the tax base and benefit society by carrying a larger share of the tax burden. So in a very real sense, small business is the ideal threshold for people building a better life and a more productive society.

Small business, by its very nature, is less capable than large firms of discovering which Government regulations affect its operation. Unless able to respond to these rules, in most cases small businesses are simply not equipped, either in terms of personnel or expertise, to keep up with the proliferation of Federal regulations.

One particularly painful illustration of this fact is the plight of the small retailer who learned in September of 1977 that the FCC had issued a ruling months earlier which prohibited the sale of 23-channel CB radios after December 31, 1977. Unfortunately, this individual had many thousands of dollars worth of 23-channel radios which he could not possibly sell by the deadline. When his case was brought to the attention of the FCC by the National Federation of Independent Business, the FCC held that the retailer had no recourse since the rule was promulgated and printed in the Federal Register well in advance of the deadline.

Obviously, the FCC assumed that the retailer had read the Federal Register regularly and that, if he did, he was able to interpret the rule and assess its impact on his operation. Unhappily, however, experience has shown what the typical bureaucrat cannot understand, and that is in the case of many small businesses neither assumption is warranted.

Regulatory difficulties of this nature do not necessarily mean that all Government regulation is unnecessary or counterproductive, or that small business should be exempted from regulation simply because they are small. There is a fundamental assumption, particularly to a democratic society, that all groups in society ought to be treated equally by their Government and that no single group ought to be granted special preferences without first establishing the existence of extenuating circumstances.

However, uniform treatment under regulation does not always result in equal treatment.

I said all of this before this very subcommittee before I became chairman as I introduced the original Regulatory Flexibility Act some 4 years ago. It was true then and it is true today. The major differences between the regulatory process of the two periods is that the Regulatory Flexibility Act is now the law of the land, but the bureaucratic guerrilla warfare continues.

While I am pleased that some agencies admirably adhere to the act, I am disappointed by the nonperformance of others. I therefore want to use this opportunity to let everyone know of my resolve to ensure that this act is implemented.

The Chief Counsel for Advocacy will prepare a report for us on this committee on each agency's performance to date. I hope to have this report in hand by Thanksgiving. We will then incorporate that report into our final report, which will contain any subcommittee legislative recommendations.

Many people seem to believe that we need some legislative changes. That, of course, is easier said than done. What we can do easily, however, is alert the appropriate authorizing committees and the appropriation committees when agencies are not following the law.

I want everyone here today to pass the word. Any agency that ignores or tries to circumvent the Regulatory Flexibility Act will meet us every time their budget request comes to the Congress, and then again when their appropriation is up for review.

The Regulatory Flexibility Act is the law of the land. It is one of the cornerstones of the future of small business, and anyone who thinks otherwise is going to find themselves on a losing team.

I believe I have made my point and, with that, we will be pleased to welcome the representatives today of the Chief Counsel for Advocacy, the Department of Defense, the Internal Revenue Service, representatives from the National Small Business Association, and the National Federation of Independent Business who will participate in this final oversight meeting for this Congress.

Mr. **Ireland**. I would like to call Mr. Charles Cadwell, Director of the Office of Interagency Affairs, Small Business Administration. Welcome.

Before you begin, it is my distinguished pleasure to introduce everyone to that distinguished Congressman from Missouri, Hon. Ike Skelton.

Mr. SKELTON. Thank you. I have no opening comments. I want to observe that obviously you mean business today, Mr. Chairman.

Mr. IRELAND. I thank you. My further message to those assembled here is that I think you will find I am not the only one that means business. The gentleman from Missouri has evidenced his interest in seeing that this type of oversight takes place.

Mr. Cadwell, would you proceed.

TESTIMONY OF CHARLES A. CADWELL, DIRECTOR OF INTERAGENCY AFFAIRS, OFFICE OF CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. CADWELL. I would be glad to, Mr. Chairman.

I appreciate the opportunity to appear this morning on Mr. Swain's behalf. The questions you have raised this morning are obviously important ones to our office and to the small business community as well.

I should point out as I begin that this statement reflects the opinions of Chief Counsel Frank Swain and is not the official position of either the administration, or the SBA.

With your permission, I would like to summarize the statement and request that the entire statement be included in the record.

Mr. IRELAND. Without objection.

Mr. CADWELL. Should the Regulatory Flexibility Act apply to the promulgation of rules by the Internal Revenue Service and the Department of Defense? These are obviously not questions asked for the entertainment of lawyers. The rules of the IRS affect billions of dollars in taxes and policies governing the manner in which they are assessed and collected. The procurement rules of the Department of Defense control the allocation of over $76 billion in prime contract actions over $10,000 annually, and billions more in small purchases.

The Regulatory Flexibility Act requires all Federal agencies to account for the small business impacts of their rules. The act requires them first to analyze the impact and, second, to communicate these analyses to the public, including the small business community, and finally, where possible, to alter their regulatory actions to account for those impacts, and to minimize them. The act and the process it requires aim toward improving the overall regulatory environment for small business.

The Internal Revenue Service has taken the position that the Regulatory Flexibility Act does not apply to many of their most significant rulemakings. It has been asserted that because the APA, which the Regulatory Flexibility Act amends, applies only to legislative rules and not so-called interpretive rules, compliance with the Regulatory Flexibility Act is not required even though the bulk of the IRS rules are interpretive and are normally published for notice and comment rulemaking and appear finally in the Code of Federal Regulations. The result is that most tax rules are not subjected to the small business analysis which the Regulatory Flexibility Act mandates.

It is our opinion that the distinction between "legislative" and "interpretive" rules is not so clear as the drafters of the APA may have hoped in 1946. Both courts and legal commentators have struggled with the definition of what rules and rulemaking are in many contexts.

There are several good reasons, from a small business viewpoint, to subject all regulations which are issued by the IRS subject to notice of comment and rulemaking to Regulatory Flexibility procedures. The first is that in practical effect the Service's interpretive rules are indistinguishable from the legislative rules. From a small business perspective, the legal niceties between these two types of rules are irrelevant. Legislative rules have the force and effect of law, and may be relied upon by taxpayers as they plan their transactions.

Similarly, interpretive regulations may also be relied upon since compliance with an interpretive rule limits the Service to challenging conformance of the taxpayer's situation to that described in the rule. Conversely, the Service will use its interpretive rules to challenge or prosecute taxpayers.

Perhaps the best example of an interpretive regulation which had a severe impact on small businesses, but was not subject to the RFA analysis requirements was that which prevented the bundling of small issue development bonds. This rule, which is still in effect, eliminated for practical purposes a crucial financing mechanism for small businesses.

There are numerous other examples of interpretive rules that have an impact on small firms. Frankly, the rules that we are most concerned about at this point are those we will see coming in the next few months as the IRS implements the Tax Equity and Fiscal Responsibility Act of 1982. In the areas of pensions, taxpayer compliance and mergers, I think we are going to see a lot of important rules for small business. We would hope the Service would perform small business analyses for these rules.

In sum, we think the state of the law is obviously unclear, and to distinguish between legislative and interpretive rules is an outmoded way to look at the Regulatory Flexibility Act. It would certainly be useful for small businesses for the IRS to perform and publish small business impact analyses. While the Act does not technically apply to interpretive rules, we believe the distinction is outmoded and, furthermore, there is no law that bars the IRS from doing this.

It is interesting to note that in the Service's periodic review plan, which they published in April, they reflected a willingness to consider some nonlegislative rules as they complied with the periodic review plan provisions. The bulk of their rules listed in that review plan were, in fact, legislative rules. But apparently the distinction is not so clear cut when it comes to complying with the review plan provisions. Frankly, we welcome this attitude, and we look forward to help them extend their efforts into the analyses provisions of the Regulatory Flexibility Act.

Moving to the Defense Department, the other agency you have asked us to comment on this morning, we believe the Department is required, or will be required, to promulgate its significant procurement regulations by notice and comment rulemaking and thus to comply with the Regulatory Flexibility Act.

As you know, the language of the Regulatory Flexibility Act limits the analysis provisions to rulemakings which are subject to notice and comment rulemaking, which is required either by section 553, or the APA, or by any other law. Section 553 of the APA exempts certain types of rules from its coverage. Among those exempted rules are those pertaining to military functions of the United States and those relating to Government property, loans, contracts, and similar items.

The Defense Department has taken the position that because of these two exemptions they issue no regulations subject to the Regulatory Flexibility Act. Obviously, we disagree.

The reason for our disagreement is that the Regulatory Flexibility Act applies to rules issued pursuant to notice and comment rulemaking required by section 553 of the "APA or any other law." In this instance, while admittedly the APA may not apply, there is other law which requires the Defense Department to issue rules subject to notice and comment rulemaking. That is the Office of Federal Procurement Policy Act which was passed in 1974, which requires the OFPP Administrator to establish "criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies, regulations." OFPP has released for public comment a proposed policy letter which would implement these statutory requirements and thus create a requirement applying to all Federal agencies of notice and comment procedures regarding procurement rulemaking, thus bringing into play the requirements of the Regulatory Flexibility Act.

Unfortunately, OFPP's proposed policy letter is not final yet. When it is, it will apply to the Department of Defense and the DOD's procurement rules will be within reach of the Regulatory Flexibility Act.

The second basis for claim for exemption is the military function exemption contained in the APA. We disagree with the argument that every function undertaken by the Defense Department is a military function and, therefore, all their proposed regulations are exempt. We think both the legislative history of the APA and commonsense dictate that Congress meant to exempt only rules that are related to uniquely military functions. The process of issuing procurement regulations by itself is not a clearly military function, nor is the act of procurement. Many other civilian agencies purchase goods and services from the private sector as well. Thus we believe that the Regulatory Flexibility Act is applicable to rules regulating the procurement functions of DOD, activities such as laundering, firefighting, purchase of tables, chairs, televisions, the operation of day care centers, and running the base commissary are not uniquely military functions.

It is interesting to note as an aside that the Army Corps of Engineers has consistently complied with the requirements of the Regulatory Flexibility Act.

We are very aware of the need to protect the confidentiality of particular transactions of a sensitive military nature. However, the Regulatory Flexibility Act does not apply to transactions; it applies to rulemaking. I do not think Congress ever had an intention and we certainly do not see a need to impose Regulatory Flexibility Act procedures on specific procurement actions, or other military activity.

There are some important practical consequences of DOD's failure to solicit public views before establishing procurement rules. As an example, this past April DOD announced that beginning July 1 solicitations for products entering the DOD logistics system would require a "3 to 9" bar code marking to be affixed on "unit of issue" packs and shipment containers. This project, which has the interesting acronym of LOGMARS, was imposed throughout DOD. Frankly, for small businesses that did not read page 32 of the April 22 Commerce Business Daily, the first they heard of it was on July 1 when contracting officers posted the notice. The machinery to affix this "3 to 9" bar code costs, I am told, between $12,000 and $25,000.

Now, while the Defense Department may well be justified in imposing this requirement, our concern is that the small business community have the opportunity to discuss the proposed requirement with the Defense Department and suggest less burdensome alternatives if there are some. We think that is the goal of the Regulatory Flexibility Act, to establish that dialog in search for a more sensible regulation.

Another example: Recently in July the Defense Logistics Agency announced a new policy whereby the practice of displaying requests for quotation for small purchases in public procurement offices would be discontinued. The justification given was to shorten procurement leadtime and to reduce administrative costs.

This policy change obviously makes it much harder for small businesses to compete for those orders when they are withdrawn from public display. Because small purchases are an important source of business for small businesses, they would have suffered serious economic losses if this policy had been maintained. Fortunately, in an after-the-fact receipt of public comment, and because of strong protests, the DLA rescinded this policy in August. Had some kind of advance notice been given to the small business community and other affected contractors, the loud outcry could have been avoided, and DLA may have been able to formulate a more realistic policy.

Finally, and perhaps most importantly, the replenishment parts breakout program, the so-called spare parts breakout program, is a proposed DOD procurement regulation which will clearly, in our opinion, have a significant economic impact on a substantial number of small entities. This program seeks to include as a supplement to the Defense Acquisition Regulations a DOD instruction which has existed for years. Despite its name, the program imposes in many cases a restrictive coding on the reprocurement of parts, which limits the opportunity to participate in this procurement to either the original part manufacturer or the original system prime contractor.

The SBA has long contended that these Procurement Method Codes, which under the new rule would be called Acquisition Method Codes, are a legally questionable way of pre-qualifying producers of these parts. Because there is no effective way to challenge the restrictive coding given to a spare part, the codes have the effect of predetermining the responsibility of a small business on a particular Government contract. This preempts the authority given to the SBA to make the certification of competency for certain small businesses.

A GAO study, as you may know, has shown great potential for tremendous cost savings if more spare parts were broken out for competition. If this proposal had been subject to notice and comment rulemaking procedures, we think some of the problems with this proposal could have been eliminated or avoided, or at least better understood by the small business community.

Finally, Mr. Chairman, I want to report to you that we do expect to report in detail on individual agency compliance in a written submission to you, which I think we can safely assure you we will have by Thanksgiving.

That concludes my statement, and I would be more than pleased to answer any questions the committee may have.

[Mr. Cadwell's prepared statement follows:]

PREPARED STATEMENT OF CHARLES A. CADWELL, DIRECTOR OF INTERAGENCY AFFAIRS, OFFICE OF CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

I. INTRODUCTION

Thank you for this opportunity to participate in the important legislative review of the Regulatory Flexibility Act [P.L. 96-354, 5 USC 601 et seq. (RFA)]. The questions before the Committee today are important to our Office and to the small businesses served by the RFA.

The success of the Regulatory Flexibility Act may ultimately depend on how we resolve the question you have raised: Should the Regulatory Flexibility Act apply to the promulgation of rules by the Internal Revenue Service and the Department of Defense?

This is not a question asked for the entertainment of lawyers. The rules of the IRS affect billions of dollars in taxes and policies governing the manner in which they are assessed and collected. The procurement rules of the DOD control the allocation of over seventy-six billion dollars in prime contract actions over $10,000 annually, and billions more in small purchases.

The RFA as it amended the Administrative Procedure Act (APA) has as its main purpose the goal of tailoring rules promulgated by agencies to the size of businesses affected by the rules. The threefold purpose of the RFA is to encourage agencies toward: (1) analysis; (2) communication; and (3) tiering and adaptation of their rules affecting small business.

The Act requires them to analyze the impact of their rules on small business, to communicate these burdens by publishing them in the Federal Register, and to consider less burdensome regulatory methods. The act and the process it requires aim toward improving the regulatory environment for small entities.

As you may be aware, the DOD takes the position that it "does not issue any regulations that are subject to the Act." The IRS takes the position that the bulk of their rules are interpretive, and hence exempted from coverage of the APA and RFA. As a result, the benefits of the RFA have not been realized in these two important areas.

We do not agree with the legal position of the DOD, and we believe that the IRS can and must take more affirmative steps to assess burdens of rules and policy actions affecting substantial small business interests. I welcome the opportunity to present you with our reasoning for our positions today. Before I do, let me say that these views are those of the Chief Counsel for Advocacy Frank Swain, and not a statement of the views of the Small Business Administration or the Administration.

II. INTERNAL REVENUE SERVICE

The Internal Revenue Service (IRS), has taken the position that the RFA does not apply to many of their most significant rulemakings. It is asserted that because the APA only applies to legislative rules and not interpretive ones, compliance with

RFA is not required for the great bulk of IRS regulations even though these rules are normally published for notice and comment. For this reason, most tax regulations are not subjected to the small business analysis that RFA mandates. Since small businesses believe that tax regulations are those having the greatest impact upon them, it is unfortunate that nearly all tax regulations are not scrutinized under the standards of the RFA.

The distinction between "legislative" and "interpretive" rules is not as clear as the drafters of the APA may have hoped in 1946. Courts and legal commentators have struggled with the definition of a "rule" in many contexts.[1] We believe there are several good reasons to subject to RFA procedures those regulations issued by the IRS pursuant to notice and comment rulemaking procedures, and included in the CFR. The primary reason is that in practical effect the Service's interpretive rules are practically indistinguishable from so-called legislative rules. From the small business standpoint legal niceties are irrelevant. Legislative rules have the force and effect of law and may be relied upon by taxpayers in planning transactions in the same manner as they may rely on the statutory language of the Internal Revenue Code. Similarly interpretive regulations may also be relied upon in planning transactions since compliance with an interpretive rule limits the Service to challenging conformance of the taxpayer's situation to the legal standard set out in the rule. Conversely the Service will use its interpretive rules in prosecuting or challenging taxpayers. Court cases have given IRS interpretive rules the effect of legislative rules.[2] Other courts have distinguished IRS regulations from revenue rulings which are granted significantly less deference.[3]

Perhaps the best example of an interpretive regulation which had a severe impact on small business, but was not considered subject to RFA analysis, was the one preventing "bundling" of small issue development bonds. This regulation eliminated for practical purposes a crucial financing mechanism for small businesses. Other examples are proposed regulations requiring the withholding of income taxes on amounts paid under an accident or health plan (February 12, 1982) and rules providing guidance to payors and payees of annuities with respect to voluntary withholdings (May 19, 1981).

Tax issues are among the most important issues for small business and we believe it is essential that the Service both understand and explain the expected effect of their rules on the vast majority of businesses that are small. It is clear that the state of the law distinguishing between legislative and interpretative regulations, especially in the context of the Internal Revenue Code, is unclear and ripe for legislative review. In all events, it would certainly be useful for small business for the IRS to submit small business impact analyses of its regulations on a regular basis. While the Regulatory Flexibility Act does not technically apply to the IRS's interpretive rules, there is no law that bars them from conducting analyses and including them in their Federal Register notices. As the Tax Equity and Fiscal Responsibility Act is implemented the Service has an important opportunity to demonstrate its concern for small business, by analyzing the impact of its regulations on small business.

III. THE DEFENSE DEPARTMENT IS REQUIRED TO PROMULGATE ITS SIGNIFICANT PROCUREMENT REGULATIONS BY NOTICE AND COMMENT RULEMAKING AND IN COMPLIANCE WITH THE RFA

The language of the RFA currently limits coverage to rulemakings subject to notice and comment required either under Section 553 of the Administrative Procedure Act (APA) or "any other law." The APA exempts certain rules from its coverage. Among these exempted rules are those pertaining to a military function of the United States [see 5 U.S.C. Section 553(a)(1)] and those relating to government property, loans, grants, benefits or contracts [see 5 U.S.C. Section 553(a)(2)].

In a June 30, 1981 letter to this Office, the Assistant General Counsel (Logistics) at DOD took the position that because of these two exemptions in the APA, the DOD issues no regulations subject to the RFA.

We believe that insofar as its procurement rules are concerned, DOD errs by taking this position.

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[1] Asimow, Michael, "Public Participation in the Adoption of Interpretive Rules and Policy Statements," 75 Michigan Law Review 520 (1977).

[2] *U.S.* v *Cartwright*, 411 US 546, 550 (1973).

[3] *Lincoln Savings & Loan Association* v. *Commissioner*, 422 F.2d 90, 92 (C.A. 9, 1970).

A. Procurement regulations are required to be promulgated by notice and comment rulemaking by "any other law"

To reiterate, the language of the RFA currently limits coverage to rulemakings subject to notice and comment required either under Section 553 of the APA or "any other law." As you are aware the APA does not require an agency to follow Section 553 notice and comment procedures for rules relating to contracts. However in this instance there is "other law." The "other law" is a provision in the Office of Federal Procurement Policy (OFPP) Act (Public Law 93-86) which requires the OFPP Administrator to establish "criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms." On December 30, 1981, OFPP released for public comment a proposed policy letter which would implement these statutory requirements by establishing uniform criteria for soliciting the views of all interested parties in the development of "significant" Federal procurement policies, regulations, procedures and forms. The OFPP defines a "significant" proposal as one having "any effect beyond the internal operating procedures of the issuing agency."

Unfortunately, OFPP's proposed policy letter has still not been made final, and no definite date has yet been announced for finalization. However, when it is final, we believe the effect will be to bring DOD procurement rules within the reach of the Regulatory Flexibility Act, despite the contract exemption in the APA.

B. Legislative history of the APA does not support DOD's rationale for claiming the military function exemption

The second reason that is the basis for DOD's claim of exemption from the RFA, is the military function exemption of Section 553(a)(1) of the APA. DOD argues that every function they undertake, including procurement, is a military function, and therefore, all of their proposed regulations are exempt. We disagree with this position because both the legislative history of the APA and common sense dictate that Congress meant military functions in the traditional sense of the word. The act of procurement is uniquely not a military function. All other agencies purchase goods and services from the private sector too. Thus, we believe the RFA is applicable to rules regulating the procurement function of DOD. Activities such as laundering, firefighting, purchase of tables, chairs and televisions, operation of daycare centers, and running the base commissary are not traditional military functions. DOD's contention that these functions are military merely because they are done by the DOD runs contrary to Section 553(a)(1) of the APA and its legislative history which focus on functions, not agencies. Their position is further undermined by the fact that the Army Corps of Engineers (ACE) of DOD has consistently complied with the requirements of the Regulatory Flexibility Act.[4] We are aware of the need to protect the confidentiality of particular transactions of a sensitive military nature. However we believe, that as the DOD develops the processes governing these transactions, including DOD's criteria for conducting non-public procurement, they are subject to the APA and the RFA.

IV. EXAMPLES

There are practical consequences of DOD's failure to solicit public views before establishing procurement rules and policies affecting substantial interests of the public.

The following are concrete examples of procurement regulations, decisions, policy changes or other significant procurement actions which were undertaken without taking views from the public. Had some form of notice and comment rulemaking procedure been used, the public, especially small business interests, would have been better served.

A. Logistics applications of automated marking and reading symbols (LOGMARS) project

On April 22, 1982, the DOD announced that beginning July 1, 1982, DOD solicitations for products entering the DOD logistics system would require a "3 to 9" bar code marking to be affixed on "unit of issue" packs and shipment containers. This project, called Logistics Applications of Automated Marking and Reading Symbols (LOGMARS) was imposed throughout DOD in a rather hasty manner and without due regard for the substantial adverse impact this new labeling requirement would have on small businesses.

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[4] See letter of March 4, 1981 from Lester Edelman, Chief Counsel, Department of the Army, Office of the Chief of Engineers which states: "Nevertheless, as Mr. Trosch recognizes, the Civil Works Directorate of the U.S. Army Corps of Engineers does engage in certain rulemaking activities covered by that Act. Consequently, I have appointed Mrs. Jane McIntyre, my Assistant Chief Counsel for Policy and Programs, as the Regulatory Flexibility Officer for the U.S. Army Corps of Engineers."

The small business community was caught by surprise by the LOGMARS project. The first notice of the project was in an easily overlooked paragraph entitled "DOD Packaging and Labeling Specification" which appeared on the last page of the April 22, 1982 issue of the Commerce Business Daily (CBD). Most small businesses which deal with DOD had no idea of this impending requirement until about July 1, 1982, the effective date, when notices from contracting activities were issued. The lack of leadtime posed a serious problem because the cost of acquiring a bar coding machine ranges from $12,000 to $25,000. Despite strong protest from the Office of Advocacy and small businesses, this policy is still in effect today.

B. Withdrawal from bid-posting of small purchase requests for quotation (RFQ's) at defense logistics agency (DLA)

On July 12, 1982, the Executive Director for Contracting at the Defense Logistics Agency (DLA) announced a new policy whereby the practice of displaying automated and manual requests for quotation for small purchases in public procurement offices of the various DLA Activities would be discontinued. The justification given was to shorten procurement administrative leadtime and to reduce administrative costs.

This policy change would have caused small businesses having much greater difficulty in competing for those orders withdrawn from public display. Because small purchases make up a significant part of their business, many small businesses would have suffered serious economic losses if the policy had been maintained.

Fortunately, because of strong protests from Chairman Weicker and Chairman Mitchell of the Senate and House Small Business Committees respectively, other strong Congressional opposition, and protests from numerous small businesses, DLA rescinded the policy on August 10, 1982.

Had some kind of advance notice have been given to the small business community and other affected contractors, the loud outcry would have been avoided and DLA would have been spared the embarrassment of having to withdraw the policy. This is an example of how flexible alternatives might have been created which would not have detrimentally affected the small business community.

C. Replenishment parts breakout program (proposed defense acquisition regulation supplement No. 6)

The Replenishment Parts Breakout Program is a proposed DOD procurement regulation, which will have a "significant economic impact on a substantial number of small entities."

The Replenishment Parts Breakout Program seeks to include as a supplement to the Defense Acquisition Regulations (DAR) a DOD instruction which has existed for years. This program's stated objective is to "break out" parts for purchase from other than prime weapon system contractors while maintaining the integrity of the systems and equipments in which the parts are to be used.

Despite its name, the program imposes in many cases restrictive coding on the reprocurement of parts, limiting the opportunity to participate to the original part manufacturer or original system prime contractor. The Small Business Administration (SBA) has long contended that these Procurement Method Codes (PMCs) (called Acquisition Method Codes (AMCs) in the proposed DAR supplement) constitute a legally questionable system of prequalification of producers. Because there is no effective way for any given small business to challenge the restrictive designation given to a spare part, the codes also have the effect of predetermining the responsibility of a small business on a particular government contract. This preempts the conclusive authority of the SBA to make the responsibility determination for the small business.

A General Accounting Office study has shown the great potential for tremendous cost savings if more spare parts were broken out for competition. If the proposed inclusion of the Replenishment Parts Breakout Program had been subject to notice and comment rulemaking procedures, the legally objectionable aspects of the program might have been eliminated. If small businesses had been given an opportunity to comment, perhaps less restrictive alternatives to the coding system, would have been found.

This concludes my statement on the status of RFA coverage of IRS and DOD rulemaking. If there are any questions, I would be happy to try to answer them.

Mr. IRELAND. Thank you. We appreciate your full statement and the details in it as well.

The gentleman from Missouri, do you have any comments or questions?

Mr. SKELTON. I understand that the Justice Department has not been cooperating with you and that they do not want you to go to court. What is the status of that situation?

Mr. CADWELL. As Mr. Swain indicated when he appeared on April 1, as we contemplated entering our first lawsuit as an amicus, the Justice Department did raise legal questions about our authority under the Regulatory Flexibility Act. Mr. Swain has met with officials of the Justice Department and with the regulatory staff in the Vice President's office. We have just recently submitted a lengthy legal rebuttal to the arguments raised by the Justice Department in those meetings.

Mr. SKELTON. Is the law unclear?

Mr. CADWELL. The Justice Department did raise questions which we thought warranted our extensive research.

Mr. SKELTON. In other words, someone is of the opinion that the law is not clear; is that correct?

Mr. CADWELL. That's correct.

Mr. SKELTON. Would you tell us the nature of the question of law, in 25 words or less? [Laughter.]

Mr. CADWELL. In 25 words or less, there is an Executive order that was issued in the midseventies which requires executive branch agencies, of which the SBA is one, to submit legal disputes to the Attorney General for resolution. The Regulatory Flexibility Act obviously runs contrary to that because it establishes an executive branch office intended to be involved in an appeal of a regulatory action. In that situation, we very often are where you're going to have a legal opinion which differs from that of another agency. So our discussions with the Justice Department and our legal research has focused on whether the Executive order, or the statute——

Mr. SKELTON. Which has priority, is that it?

Mr. CADWELL. Which has priority, and whether the——

Mr. SKELTON. The law that Congress passed, or an Executive order?

Mr. CADWELL. Whether the Executive order is founded on constitutional principles or statutory principles.

Mr. SKELTON. What's the problem?

Mr. IRELAND. Obviously we're right.

Mr. SKELTON. The law has priority, doesn't it?

Mr. CADWELL. There is also another statute which gives the Attorney General sole litigating authority.

Mr. SKELTON. That's fine, but your Executive order is moot, is it not? You're only dealing with two statutes, the authorizing statute passed, and the statute that authorizes the Attorney General to bring suits. Those are the only two issues. I think the Executive order would be moot for this. Is that not your position?

Mr. CADWELL. That is our position. The real question, and the focus of most of our research, has been on the issue of whether the constitutional doctrine of separation of powers is validly brought up in this instance.

Mr. SKELTON. You lost me on that one.

Mr. CADWELL. Basically, the argument came down as to whether Congress could establish an executive branch official, free from the control of the executive branch without creating an independent agency, such as the ICC or the FCC.

Mr. SKELTON. How do we get a decision on that?

Mr. CADWELL. We have just submitted our analysis to the Justice Department.

Mr. SKELTON. They're not the judges.

Mr. CADWELL. No, they're not.

Mr. SKELTON. How do we get a legal decision on it?

Mr. CADWELL. As an executive branch official, our first step was to try and resolve this with the Justice Department using the procedures that are set out. We thought we could get a more reasoned solution than we could by confusing a particular regulatory appeal with a request to a judge to resolve a dispute between two agencies, losing the focus on the lawsuit brought by a private party concerning a regulation.

It has taken us quite a while to get this resolved. We are anxious to be through with it so we can be clear.

Mr. SKELTON. When do we hear the final determination?

Mr. CADWELL. I would hope in a matter of weeks.

Mr. SKELTON. Weeks? You will, of course, notify this committee?

Mr. CADWELL. Certainly.

Mr. IRELAND. Did my colleague want to touch on anything else?

Mr. SKELTON. No, Mr. Chairman.

Mr. IRELAND. Let me say in regard to the discussion that just took place I think we are all aware of the typical activity that takes place in the bureaucracy as kind of a fight over the "turf" out there. As usually happens, when the bureaucrats start fighting over turf, the first thing that happens is the American public becomes the least important item around.

In that regard, however, I would point out that the Office of Chief Counsel for Advocacy I think has done a remarkable job.

I would also point out some of that independence is indicated by your opening statement, just as the mandate of the Chief Counsel of Advocacy is constituted to be. You are speaking independently of the administration, independently of the agency, and that is the charge of the Counsel of Advocacy, to lay it on the line. So there are those who urge you to "hang tough" and work at it.

Do you think there are any problems in having a report on all the agencies by Thanksgiving?

Mr. CADWELL. No, there should not be any problem at all.

Mr. IRELAND. That's good.

In the dialog concerning some of the problems with the IRS, are you getting any cooperation on a voluntary basis from the IRS, or are you getting just the stonewall treatment?

Mr. CADWELL. In the few proceedings we have been involved with them—I guess most notably would be the industrial development bond issue last summer—we frankly, disagreed with them on the impact of that rule, whether the rule was warranted and how they were going about it. Frankly, the most recent Tax Act has superseded that argument.

I think, having talked with representatives of the IRS in the past several days as we prepared for this hearing, I am confident of their good intentions. As our statement says, if you look at the letter of the law, they have a very good argument for restricting their analyses to legislative rules. We think the letter of the law is a little outmoded and doesn't help the small business community, so we are looking for a little more compliance with the spirit of the law.

Mr. **Ireland**. What kind of response do you get from the DOD on the "other law" argument?

Mr. **Cadwell**. We have had no formal response to that suggestion. I know from informal discussion that it is a question which they agree is a question. Since the OFPP regulations are not final, we haven't been forced to face the issue yet. When the OFPP rules will be final is beyond my knowledge.

We are looking forward to that day because it will give the small business community access to the process of making those procurement rules.

Mr. **Ireland**. When you point out to them they already have the Corps of Engineers operating under the Regulatory Flexibility Act, how do they respond, and at the same time claim that all of their functions are military? It seems to the layman that they have pretty well hung themselves on that line. What kind of response do they give?

Mr. **Cadwell**. I think the whole definition of what the military function exemption means has not really been addressed in several years, aside from some law review articles which, for the most part only law professors and law students read. I know that as we have looked into this issue, it becomes clear to us that what we're talking about are functions that are military in nature, and not transactions which are conducted by the military. The emphasis is on the nature of the function, not the agency performing it. For example, if DOD were issuing rules regulating access to Strategic Air Command bases or something like that, those are very clearly military rules. Procurement rules are not uniquely military, and it is our argument the distinction has been lost as we broadly define anything done by the military as a military function.

Mr. **Ireland**. Do they do anything to try to prove their point? I mean, do they come up and say, "If we don't have a laundry out there outside the base, we're in trouble?"

Mr. **Cadwell**. Aside from our correspondence of a spring or two ago, we have not had any formal response from them on that point. It is our hope that this hearing will provide the basis for that exchange.

Mr. **Ireland**. Are they just totally uncooperative, or do you just get silence from across the Potomac?

Mr. **Cadwell**. I guess between the two, I would choose silence from across the Potomac. I have had several discussions with the witness who will be here this morning from the Department of Defense and I am not concerned about getting a straightforward statement of their position. So I guess I wouldn't want to say they were stonewalling us on their answer. Whether they agree with us in the end is another question entirely.

Mr. IRELAND. We have a vote, and in deference to everyone here, we will continue to hear the testimony. I will be back as soon as I can.

Thank you.

Mr. LYNCH. Thank you, Mr. Cadwell.

Is the witness from the NFIB here?

Ms. DOUGLAS. Yes.

Mr. LYNCH. All right. Would you like to deliver your testimony now, Ms. Douglas? We have your statement and it will be placed in the record. You can either read your statement or summarize it, whatever you would like to do.

Ms. DOUGLAS. Thank you. I appreciate that.

TESTIMONY OF SALLY L. DOUGLAS, ASSISTANT DIRECTOR OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. DOUGLAS. My name is Sally Douglas. I am the assistant director of research for the National Federation of Independent Business, an organization which represents over 500,000 small and independent business owners across the country.

We have been interested in the Regulatory Flexibility Act since the very beginning, and we are also trying to keep tabs on how it is being implemented. We have information that leads us to believe many of the agencies of the Federal Government are trying to comply with the act. Of the agencies we are most familiar with, I think we probably give the highest marks right now to the Department of Labor, which is kind of a curious circumstance, but within the past year we have seen within the various agencies within that Department some quite startling attempts to balance the concerns of employees versus the concerns of overburdening regulations on employers.

I note specifically several things that the Occupational Safety and Health Administration has done, one of which was to send out a directive to its regional and district offices that all businesses with 10 or fewer employees were to be exempted from general schedule safety inspections. This is something we have tried to do through the legislative process for years. They did, in fact, take the Byron amendment one step further by canceling the exception to the exemption for some hazardous industries. We are quite encouraged with their efforts.

Another example I would give, which I think is an outstanding example of the Regulatory Flexibility Act, was the attempt to revamp the Office of Federal contract compliance programs. The small business exemption provided in the OFCCP proposals—which, unfortunately, have been tabled—would have released from unnecessary burden about 75 percent of the contractors subject to the regulations. These people would not have to prepare a written affirmative action plan. Yet, even though 75 percent of the contractors would have been exempted, it would not have significantly reduced the number of employees protected by such plans.

Similarly, proposed revisions to the Davis-Bacon regulations were revised before the issuance of final rules this past May to reduce substantially the economic impact on small business. I think they are taking a good hard look at some of the things they have more or less accepted as common practice over the years. They have made an honest attempt to try and single out those areas in which they can make substantial change without detriment to the employee groups which they are designed to protect.

One issue that I would like to address my comments to was raised very early in the development of the act. It apparently has resurfaced with some agencies contending that if their actions are to have a beneficial impact on small firms, then they are not subject to compliance with regulatory flexibility.

I say it was raised very early on. In hearings held in October 1977, before the Senate Judiciary Committee's Subcommittee Administrative Practice and Procedure, we were asked to answer the question of whether regulatory flexibility should come into play when we have a situation where regulations are being promulgated which only affect small businesses. We stated at that time the intent of the law as we saw it was to sensitize agencies to small business concerns, and tiering was a tool, not the end purpose, of the Act. Therefore, the regulatory flexibility analysis in and of itself had value. We said:

> If the analysis process is valid for the purpose of tiering, it is valid for the establishment of rules and regulations under other conditions. For example, if an analysis should lead to tiering of a particular regulation, then it effectively contributed to the development of a set of regulations that apply to a particular group of small businesses. Why should the contribution of an analysis be any less when only small firms are those to be impacted by a set of regulations?

Even more to the point, Paul Verkiul, dean of the school of law at Tulane University, and chairman of the regulatory reform section of the U.S. Administrative Conference, addresses the issue of "beneficial impact" directly. He points out that in the House of Representatives floor discussion of this bill they devoted a substantial portion of its three-page discussion of the issues to definitional problems, and stated that the term "significant economic impact" is neutral with respect to whether such impact is beneficial or adverse. Thus, a rule's potential benefit to small entities does not discharge an agency from the regulatory flexibility process.

We believe the legislative history is clear on this point. There was a conclusive decision on the part of Congress that there was no distinction to be made between negative and beneficial impacts. Therefore, agencies which have adopted the position they can forego compliance with the act in cases where they are promulgating regulations to benefit small business are unquestionably in direct contravention to the law.

Mr. LYNCH. I just might add on that point that the chairman has agreed with what you have said in earlier hearings. He has also pointed out that merely because someone at an agency believes that the rule will be beneficial, it doesn't mean it will be beneficial. How do we know without an analysis and hearing from the small business community?

Ms. DOUGLAS. Or even if it is beneficial, perhaps it could be more beneficial.

Mr. LYNCH. More beneficial, correct.

Ms. DOUGLAS. Successful implementation of the Regulatory Flexibility Act depends in large part on overcoming the inherent reluctance of the bureaucracy to adapt to change. However, there is an impediment which is imposed by the act itself. In attempting to provide an unquestioned legitimacy to regulatory flexibility by incorporating the bill as a new chapter into the Administrative Procedure Act—thereby insuring that small business impact would be given due consideration in the normal rulemaking process, as opposed to being treated as an exceptional circumstance—certain departments and agencies have discovered loopholes which were never intended by the act's prime sponsors to remove themselves from under the purview of the act. Of special concern to NFIB is the insistent refusal by DOD and IRS to adhere to the provisions of the Act.

The intent of regulatory flexibility was that meaningful regulatory reform should be governmentwide, enforceable, and coordinated with the legislative framework for the agencies. There was every intention to include all departments and agencies within the purview of regulatory flexibility legislation. Exemptions were given to certain agencies and they are clearly pointed out. There is no such exemption in the law for IRS and DOD.

It is absurd, in our opinion, to assume for example that the IRS, the sole agency of the Federal Government that impacts the universe of small business, was to have been exempted from the act. Yet IRS officials have steadfastly refused to incorporate the Act's provisions into many of their rulemaking procedures, contending that IRS rulings are, for the most part, interpretative in nature and therefore not subject to regulatory flexibility considerations.

Our testimony contains four instances in which IRS disregarded small business impact of rulings. In many cases they were eventually forced to consider that. Since they are a part of the statement, I won't go into those. But I would like to mention that the attitude IRS has maintained vis-a-vis small business, we think quite pointedly came into play in the recent deliberations over the tax bill. As you are quite aware, I am sure, IRS was included under the Taxpayer Compliance Act in terms of being provided an exemption from the Paperwork Reduction Act of 1980, and from the regulatory oversight function within OMB. What the IRS, in essence, we believe, was saying was that they will brook no interference from outsiders in determinations of regulations and resultant paperwork, despite the fact that this agency alone accounts for the predominant share of the paperwork burden imposed on small business, and generates without doubt the most complex array of regulations with which small firms must contend. If regulatory flexibility is ever to have any real impact, it must be squarely focused on the biggest culprit of all: the IRS.

I would agree with what Mr. Cadwell said earlier: They may have a case, indeed, in terms of the letter of the law; but we, too, would like to see them comply with the spirit of the law.

DOD has avoided compliance by stating that, as the APA does not cover rules involving military functions, regulatory flexibility does not apply to DOD rules. The sole exception seems to be that the U.S. Army Corps of Engineers has steadfastly complied with the act. The result, however, is that the rules and regulations governing contracting out have been abitrarily isolated by DOD from the protections that should be afforded small business contractors under the Regulatory Flexibility Act.

Again, Mr. Cadwell talked about the LOGMARS situation, which was also brought to our attention by several members, and the posting of the RFQ's. It is my understanding the issue is not quite resolved at this point.

We have seen over the years an inherent bias against small business in the procurement process, and we are concerned about that, and feel this is an area that needs much work, where substantial change could be made to the benefit of both DOD and the small business community. We don't believe that DOD's goals in procurement contravene the beneficial impacts on small business. Small business has something to contribute to the DOD procurement process, unquestionably.

On August 12 of this year, regulatory flexibility oversight hearings were held jointly by the Senate Small Business Committee's Subcommittee on Government Regulation and Paperwork, and the Senate Judiciary Committee's Subcommittee on Regulatory Reform. The primary purpose was to discuss S. 2170, which was introduced by Senator Dodd. What that legislation would do is to amend Chapter 6 of the APA to insure that proper analyses of small business impact be performed by IRS and DOD on a routine basis.

We feel very strongly the necessity for insuring compliance by both these parties with the requirements of reg. flex. We have commended Senator Dodd for introducing legislation in the Senate, and we urge the Chairman to introduce similar legislation. We will work very hard to see enactment of such legislation.

There is another point I would like to bring up which has recently come to our attention. If DOD and IRS can be said to have mounted a frontal assault on reg. flex., certain other opponents within agencies and other bodies should now receive attention for trying the "back door" approach. I refer to the current effort to use particular legislative vehicles to gain statutory exemptions from reg. flex., the Paperwork Reduction Act, and Executive Order 12291. Specifically, we would like to direct the chairman's attention to H.R. 5002, the Fishery Conservation and Management Improvement Act, which was recently reported out of the House Merchant Marine and Fisheries Committee, and is scheduled for floor action this Congress.

Section 9(h) of this bill contains an effective exemption from the three legislative and administrative mandates mentioned above, which pertains to the data collections and regulatory actions of the Secretary of Commerce, in conjunction with the Regional Fishery Conservation Management Councils. If this legislation and its companion bill in the Senate, S. 2450, which contains similar exemptions, are enacted in their present forms, the doors will be open for agencies to use this Act as a precedent for gaining exemptions on a piecemeal, program-by-program basis. Indeed, a precedent of sorts may already be established by enactment last year of the Marine Mammal Protection Act, which contains similar provisions.

We are very concerned about this movement within Congress. We feel it is important that the Chairman consider this movement because we are afraid the framework we spent so many years establishing is going to be dismantled piece by piece.

That will conclude my remarks.

[Ms. Douglas' prepared statement follows:]

PREPARED STATEMENT OF SALLY L. DOUGLAS, ASSISTANT DIRECTOR OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Chairman Ireland, the National Federation of Independent Business (NFIB), which represents in excess of 500,000 small and independent business owners across the country, is pleased to have this opportunity to comment on the progress of implementing Public Law 96-354, the Regulatory Flexibility Act.

Regulatory actions constitute the most direct contact between the government and small business. Other types of government actions have, of course, an impact on the small business community. Yet the average small business owner cannot always trace a direct line from, for example, the enactment of a particular bill and its effect on his business or the economy at large. Regulatory actions, on the other hand, are much more readily identifiable and their impact is often more immediately felt.

The Regulatory Flexibility Act is the catalyst for a fundamental change in the relationship between the government and small business. By mandating a fundamental alteration in the normal conduct of agencies' rulemaking procedures, the Act attempts to impose a change of attitude among agency officials. No longer can the needs and concerns of small business be overlooked in determinations of regulatory policy and practices. The impact of government action on small firms must be taken into consideration in the beginning of the regulatory process, not after the fact.

Such sweeping changes as the Regulatory Flexibility Act imposes are not accomplished overnight, yet there has been progress. It has, of course, been easier for some agencies to adapt to the changes mandated by the Act because these agencies had already developed a certain sensitivity to small business. In addition, there is no question that the continual interest shown by the Act's sponsors, such as yourself, Mr. Chairman, through the use of Congressional oversight has been an essential ingredient in promoting effective implementation of the Act. Equally encouraging to NFIB was the demonstration of the President's strong commitment of the Regulatory Flexibility Act in his message on "The State of Small Business".[1] Not only was specific mention made of the importance of the Act, but he issued a challenge to the agencies to comply with the letter and the spirit of the law:

"*Full utilization* of the provisions of the Regulatory Flexibility Act will be a principal theme of our regulatory reform efforts over the next three years. I will direct each federal department and agency to accelerate the time for completion of the review of existing regulations as specified in the Regulatory Flexibility Act from *ten to five years.*"[2] (Emphasis added.)

The challenge to review all existing regulations in half the time allowed by the law is, to NFIB, proof of the President's personal commitment to elimination of unnecessary, burdensome regulation. This review will undoubtedly constitute the severest test of the Act in the next few years.

The Chief Counsel for Advocacy, Frank Swain, plays, as we all know, a pivotal role in insuring the successful implementation of the Regulatory Flexibility Act. He is in a unique position not only to offer cogent testimony to the successes and failures of agencies in complying with the Act but to exert direct influence on the agencies to conform to the principles and purposes of reg flex.

Full and effective implementation of the Regulatory Flexibility Act is, therefore, dependent upon the combined efforts of a powerful coalition of forces—a strong commitment by the President, diligent oversight by Congress, aggressive exercise of the unique rights and responsibilities vested in the Chief Counsel for Advocacy, and continual monitoring and commenting by the small business community and its representatives regarding agencies' compliance.

We would like to offer some examples of what we believe are indications of the Regulatory Flexibility Act "taking hold" in agencies with which we are familiar.

Earlier in my testimony, I made reference to the fact that some agencies have become more sensitized than others to small business. In most cases, the sensitivity has been of a positive nature. The Environmental Protection Agency, for example, has on more than one occasion contacted NFIB for assistance in, for example, determining a small business definition or determining the impact of a particular regulation. We were, therefore, pleased to see that the recent proposed rule on reporting requirements pursuant to section 8(a) of the Toxic Substances Control Act contained an exemption for small business from some of these requirements. Reporting and recordkeeping requirements have long imposed a special hardship on small business. Any reduction of such requirements is cause for celebration.

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[1] "The State of Small Business: A Report of the President" (Washington, D.C.: GPO), March 1982.

[2] Ibid, p. 14.

Needless to say, NFIB is acutely aware of the attempts of agencies within the Department of Labor to strike the proper balance between the legitimate rights of the labor force and the legitimate concerns about over-regulation of small business owners. We do believe, in addition, that recent actions by DOL officials demonstrate conclusively that regulatory flexibility can work without impairing fulfillment of an agency's mission.

OSHA is an agency that has long been sensitized to small businesses. Until this administration, however, little more than lip service to small business concerns was to be expected. Over the past year, however, OSHA has instituted some startling administrative changes, many of which have revealed a responsive attitude towards small firms' real capabilities and real limitations. For example, NFIB believes that such changes as OSHA's recent directive to exempt businesses with ten or fewer employees from general schedule safety inspections are indicative of the very changes in attitude that the Act tries to promote.

An outstanding example of regulatory flexibility was the attempt to revamp DOL's Office of Federal Contract Compliance Programs. The small business exemption provided in the OFCCP proposals—which, unfortunately, were tabled recently—would have released from the unnecessary burden of having to prepare a written affirmative action plan about 75 percent of the contractors subject to OFCCP regulations, without significantly reducing the number of employees protected by such plans.

Similarly, proposed revisions to the Davis-Bacon regulations were revised before the issuance of final rules this past May to reduce substantially the economic impact on small business.

One issue that was raised very early on in the development of the Regulatory Flexibility Act was whether the Act would apply to regulatory activities which affected only small businesses, and/or which were intended to have a beneficial impact on these firms. In hearings held in October of 1977 before the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure, NFIB pointed out that the intent of regulatory flexibility was to establish a framework in which regulators would garner the information necessary in reaching rational decisions upon which to base their regulatory actions. To this end, we stated:

"If the analysis process is valid for the purpose of tiering, it is valid for the establishment of rules and regulations under other conditions. For example, if an analysis led to tiering of a particular regulation, then it effectively contributed to the development of a set of regulations that apply to a particular group of small businesses. Why should the contribution of an analysis be any less when only small firms are those to be impacted by a set of regulations?"[3]

Even more to the point, Paul Verkiul, Dean of the School of Law at Tulane University and Chairman of the Regulatory Reform Section of the U.S. Administrative Conference, addresses the issue of "beneficial impact" directly in an article published in the Duke University Law Review (April, 1982):

"The House [of Representatives], devoting a substantial portion of its three-page discussion of the issues to definitional problems, stated that 'the term "significant economic impact" is neutral with respect to whether such impact is beneficial or adverse.' Thus, a rule's potential benefit to small entities does not discharge an agency from the reg flex process . . ."[4]

Clearly, legislative history contains a conclusive decision that Congress did not intend to distinguish between negative and beneficial impacts. Therefore, agencies which have adopted the position that they can forego compliance with the Act in cases where they are promulgating regulations to benefit small business are unquestionably in direct contravention to the law.

Successful implementation of the Regulatory Flexibility Act depends in large part on overcoming the inherent reluctance of the bureaucracy to adapt to change. There is, however, another impediment which is imposed by the Act itself. The provisions of the Regulatory Flexibility Act limit coverage to rulemakings required under Section 553 of the Administrative Procedure Act (APA) or any other law. However, using the APA definition of rules leaves the subject to interpretation whether the Regulatory Flexibility Act covers, in fact, all types of rulemaking which may impact on small business and other small entities. The "grey area" extends over a variety of regulations: rules that involve a military or foreign affairs function; rules covering agency management, personnel, or public property; loans, grants, benefits or contracts; rules of an interpretative nature; general policy statements or statements regarding agency organization, procedures or practices; and "good cause" findings by agencies that procedures are impractical, unnecessary or contrary to the public interest unless another law applies.

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[3] Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary (Washington, D.C.: U.S. Government Printing Office), October 7, 1977, p. 153.

[4] Verkiul, Paul, Duke University Law Review, p. 243.

Ironically, in attempting to provide an unquestioned legitimacy to regulatory flexibility by incorporating the bill as a new chapter into the APA—thereby insuring that small business impact would be given due consideration in the normal rulemaking process as opposed to being treated as an exceptional circumstance—certain departments and agencies discovered a loophole which was never intended by the Act's prime sponsors to remove themselves from under the purview of the Act. Of special concern to NFIB is the insistent refusal by DOD and IRS to adhere to the provisions of the Act.

The Senate Judiciary Committee's report on the original regulatory flexibility bill included the statement: "The Committee believes that meaningful regulatory reform must be government-wide, enforceable, and coordinated with the legislative framework for the agencies." [5] Clearly, there was every intention to include *all* departments and agencies within the purview of the regulatory flexibility legislation. It is patently absurd to assume that the IRS, the sole agency of the Federal Government that impacts the universe of small business, was to have been exempted from the Act. Yet IRS officials in both the previous and the present Administrations have steadfastly refused to incorporate the Act's provisions into their rulemaking procedures, contending that IRS rulings are for the most part interpretative in nature and therefore not subject to regulatory flexibility considerations.

Four recent IRS rulings will serve to document IRS's cavalier attitude regarding small business concerns.

In 1969 Congress authorized the IRS to issue regulations to provide clear guidelines for distinguishing debt from equity. IRS proposed regulations in March, 1980, and reproposed regulations in December, 1981. These regulations were slated to become effective on July 1 of this year. Throughout the develpment of the debt-equity regulations, IRS steadfastly maintained that the regulations would have no tax impact on small firms. NFIB and other interested parties, having conducted their own analyses of the proposal, found the evidence to be quite the contrary. In fact the bottom line of our analysis was that the regulations would be "a real disaster for both the IRS and small business . . . this proposal is not salvageable in any form." [6] Heavy lobbying by concerned Members of Congress, NFIB, and other groups insured that these regulations in their present form will not see the light of day.

On another occasion, IRS fought tooth and nail in a test of wills with Congress and small business over proposed revisions to dollar-value LIFO regulations. Under extreme pressure—and explicit Congressional mandate—IRS did perform a regulatory flexibility analysis in this instance.

In two other instances, IRS again balked at compliance with the Act. I refer to the proposed regulations on Income Tax Withholding and the penalties for Underpayment of Deposits and Overstated Deposit Claims. In both cases, a severe burden is imposed on small firms in terms of cash flow interruptions and heavy penalty provisions. Yet in neither case is tax revenue expected by IRS to be raised.

In addition to these four particular rules, the small business community recently witnessed an outstanding example of IRS arrogance in its demand to be considered exempt from compliance both with the Paperwork Reduction Act of 1980 and with the regulatory oversight function within OMB. In essence, what the IRS was saying was that they will brook no interference from outsiders in determinations of regulations and resultant paperwork—despite the fact that this agency alone accounts for the predominant share of the paperwork burden imposed on small business and generates without doubt the most complex array of regulations with which small firms must contend. If regulatory flexibility is ever to have any real impact, it must be squarely focused on the biggest culprit of all: the IRS.

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[5] Senate Report No. 96-878, p. 10.

[6] Internal memo prepared by Abe Schneier, NFIB, Tax Counsel, dated April 8, 1982.

DOD has avoided compliance by stating categorically that, as the APA does not cover rules involving military functions, the new Chapter 6 of the APA does not apply to DOD rules in toto, the sole exception being rules promulgated by the U.S. Army Corps of Engineers. The result: the rules and regulations governing contracting out have been arbitrarily isolated by DOD from the protections that should be afforded small business contractors by the Regulatory Flexibility Act. DOD's refusal to incorporate regulatory flexibility procedures into its rulemaking process is yet another outstanding example of the bias inherent in the procurement system against small business. It is a bias which is unjustified and can no longer be tolerated.

Let me cite one example which has recently been brought to our attention by an NFIB member who contracts with DOD for various industrial products. Our member informed us that, beginning July 1, 1982, DOD solicitations for both large and small purchases would include a mandatory requirement for Logistics Application of Automated Making and Reading Symbols, otherwise known as LOGMARS. Developed by DOD, the program's avowed intention is to "facilitate the handling of supplies and reduce costs by eliminating paperwork involved in receipt, inventory control and shipping." [7] The requirement involves affixing a "3 to 9" bar code marking on "unit of issue" packs and shipment containers.

Compliance with this labeling requirement, imposed ostensibly as a "paperwork reduction" measure, would involve either the purchase of a special printer at an enormous cost—$10,000 was the figure DOD officials quoted to your member—or the contracting out cost to have the labels printed by someone else. As our member points out, it is not economically feasible for most small contractors to acquire their own printers; supply is limited; increased demand resulting from the new requirement may well make firms presently making labels unresponsive to small purchases, for unit cost for small runs may well be too high; and, in any case, the resultant costs imposed by the new requirement will either have to be absorbed or passed on to DOD, the purchaser.

What incensed our member the most was the fact that the regulation was promulgated hastily, with little advance notification to affected suppliers, and that alternatives did not seem to have been considered. Needless to say, had the regulatory flexibility procedures been implemented by DOD, our member's complaints would not have had to have been expressed after the fact.

This is just one example of DOD's refusal to consider small business impact during its regulatory deliberations. We note briefly a few other instances of how DOD manages to rig the system against small contractors:

"A directive put forth by the Defense Construction Supply Center requires a contractor to meet certain specified conditions before he can bid on a government contract. First, he must prove he has the available parts to do the work. However, he must be able to prove that the parts are made by or bought from the manufacturer who supplied the original equipment (OEM). If the parts are obtained from government surplus stock, the bidder must submit an invoice to prove he bought the part from the government. Finally—and most abhorrent—if the bidder is capable of manufacturing the part, he must first submit a proposal to the OEM—his direct competitor—to obtain the OEM's approval of his specifications. This information was given to NFIB by a small business contractor who followed all the procedures and was told by the OEM that under no circumstances would he comment formally on whether the possible competitor's product was as good as his.

"The paperwork on certain items being purchased by agencies within DOD are kept in specially colored file folders to insure that buyers repurchase these items from the original manufacturers only.

"The Defense Logistics Agency recently gave notice that the practice of displaying Requests for Quotations (RFQ) for contracts below a certain dollar threshold will be discontinued. Their justification is to reduce administrative costs and shorten procurement administrative lead time. The impact on small business: no small contractor who is not currently on a vendor's list will have easy access to information on quotes he could possibly bid on."

On August 12 of this year, reg. flex. oversight hearings were held jointly by the Senate Small Business Subcommittee on Government Regulation and Paperwork and the Senate Judiciary Subcommittee on Regulatory Reform. The primary purpose of the hearing was to discuss the merits and drawbacks of S. 2170, introduced by Senator Dodd to amend Chapter 6 of the APA to insure that proper analyses of small business impact be performed by IRS and DOD on a routine basis. I believe IRS's high regard for small business concerns, evinced on so many occasions, speaks for itself by their noticeable absence at this hearing. DOD, on the other hand, did participate, and managed to befuddle everyone in the room with the twists and turns in its statement. Essentially DOD's chief claims—in addition to the usual "threat to national security" argument—were that reg. flex. analyses would be a counter productive approach to small business problems; DOD simply does not have the resources to comply with the Act; and finally, DOD in essence already performs small business impact analyses on a regular basis.

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[7] Defense Logistics Agency, "Notice to DCSC Suppliers: Implementation of LOGMARS by DCSC," undated.

My remarks on IRS and DOD should make it abundantly clear that NFIB feels very strongly the necessity for insuring compliance by both parties with the requirements of the Regulatory Flexibility Act. We commend Senator Dodd for introducing legislation in the Senate, and we urge the Chairman to introduce similar legislation in the House. We assure you, NFIB will work to see enactment of such legislation.

If DOD and IRS can be said to have mounted a frontal assault on reg. flex., certain other reg. flex. opponents within agencies and other, quasi-governmental units should now receive attention for trying the "back door" approach. I refer to the current effort to use particular legislative vehicles to gain statutory exemptions from reg. flex., the Paperwork Reduction Act, and Executive Order 12291. Specifically, we direct the Chairman's attention to H.R. 5002, the Fishery Conservation and Management Improvement Act, which was recently reported out of the House Merchant Marine Fisheries Committee and is scheduled for floor action this Congress. Section 9(h) of this bill contains an effective exemption from the three legislative and administrative mandates mentioned above, as pertains to the data collections and regulatory actions of the Secretary of Commerce, in conjunction with the Regional Fishery Conservation and Management Councils. If this legislation and its companion bill in the Senate, S. 2450, are enacted in their present forms, the doors will be open for agencies to use this act as a precedent for gaining exemptions on a piecemeal, program by program basis. Indeed a precedent of sorts has already been established by enactment last year of the Marine Mammal Protection Act, containing similar provisions.

The regulatory and paperwork review framework that is so vital to small business may well be in danger of being dismantled piece by piece. We urge the Committee to use whatever powers are at its disposal to prevent this from happening.

Mr. LYNCH. Thank you.

On the subject of H.R. 5002, we have asked the Speaker and also the Rules Committee for referral of that bill before it goes anywhere. I understand in the Senate that several Senators have put a hold on that legislation.

Ms. DOUGLAS. That's true. We understand that the committee offered to adopt compromise language and the Senators who put a hold on the bill said strike it or nothing.

Mr. LYNCH. That's a fair compromise.

Concerning legislative changes in the Regulatory Flexibility Act, NFIB supports Senator Dodd's bill. Do you believe any other changes are needed beyond the Dodd bill? For example, the question of judicial review, have you looked at that?

Ms. DOUGLAS. We have looked at it, but I would not care to comment on legislative change on the judicial review section at this time, considering the case before the courts. I do not believe that the recent opinion by Judge Greene deals effectively with what the actual judicial review section says. I don't believe it was a just opinion.

The language is constructed in such a way that, for someone who is not conversant with legal practices—as I am not—it takes a few readings to try and understand exactly what is being attempted there. Clearly, I think legislative history speaks of the point that judicial review was definitely intended, and I think Judge Greene's decision did not take that into account.

Mr. LYNCH. Is NFIB seeking comments on the various review lists that are being put out by the agencies, reviewing regulations already on the books? For example, the IRS has put out a list for the next 5 years, I think, year by year, on regulations they would like to review, and asking for comments on that. Are you going to comment and are you soliciting comments from your members?

Ms. Douglas. Yes, we do participate in various agency reviews. We have submitted comments in the past on several things and will continue to do so.

Mr. Lynch. Mr. Topping?

Mr. Topping. No questions.

Mr. Lynch. Thank you very much, Ms. Douglas.

Mr. Glover we have your statement and it will be made a part of the record. You can either read it or summarize it, whichever you care to do.

TESTIMONY OF JERE GLOVER, ON BEHALF OF THE SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. Glover. Thank you very much.

Good morning. My name is Jere Glover. I am here on behalf of the Small Business Legislative Council, which comprises 70 trade associations, representing over 4.5 million small businesses. As former Deputy Chief Counsel for Advocacy, I had the honor of working closely with Congress during the debates and passage of the Regulatory Flexibility Act. The Small Business Legislative Council was active and instrumental in securing the passage of that law.

Without Mr. Ireland, the chairman of this subcommittee, and his able staff's hard work, there would be no Regulatory Flexibility Act to discuss today. I think we must begin this hearing by thanking Mr. Ireland and this subcommittee for the work they have done on the issues of small business and regulatory problems during the past few years.

The Regulatory Flexibility Act and its companion bill, the Equal Access to Justice Act, were designed to change the way the Government and the Congress approached small business. All too often in the past, the Government had ignored the distinctions between large and small businesses.

The Regulatory Flexibility Act was designed to prevent agencies from passing rules and regulations without first analyzing their effect on small business and considering less burdensome alternatives.

One of the things we must remember when we discuss the Regulatory Flexibility Act is that it was designed to codify what should have been good government practice before the Act was passed. The fact that an agency which imposes a regulation on people should first make its best effort to communicate with the people to be regulated, and then consider the impact of the regulation. The fact that some agencies didn't is a sad commentary on the state of Government rulemaking.

The Regulatory Flexibility Act had lofty goals and objectives. It would appear that at this stage those lofty goals are well on their way to being carried out. Government agencies, by and large, have modified their procedures to require regulatory flexibility analyses. By and large, the Office of Advocacy has been doing an effective job monitoring and reviewing proposed Government regulations.

President Reagan, in his first annual report on the state of small business, has directed all Government agencies to accelerate their review of regulations from 10 years to 5 years. By raising compliance visibility under the Regulatory Flexibility Act to the presidential level, this administration has clearly indicated its strong support for the Regulatory Flexibility Act.

Given the basic concept that the Regulatory Flexibility Act was designed to codify what is "good government," and what should have been occurring under the Administrative Procedure Act in prior cases, I am always shocked to find that some agencies have ignored it. It is not radical to require an agency to analyze and know what it's doing to a particular segment of the economy before they enact a regulation. For an agency to say, even without the Regulatory Flexibility Act, "we aren't even going to consider its impact on small business," is the height of arrogance and it is bad government, government at its worst. The Administrative Procedure Act was designed to preclude that and the Regulatory Flexibility Act simply codifies and clarifies those duties and responsibilities of Government officials.

Article II of the Constitution states "The executive power shall be vested in the President of the United States of America. He shall take care that the laws be faithfully executed." As a member of the executive branch of Government, each Government official has this constitutionally mandated role. When a Government official doesn't like a law, he should come to Congress and suggest it be changed. But as long as it is the law, it is his obligation and sworn duty to uphold the laws of this country.

We come to situations where Government will generally be complying with the Regulatory Flexibility Act, but on specific instances, where for some reason, be it administrative expediency, be it influenced by large firms, be it personal desires of Government officials—the impact on small business will be ignored. We have seen one case involving the Federal Aviation Administration, where they imposed regulations that would have in effect precluded small business from participation. Through the actions of this committee's oversight, the intervention of the Office of Advocacy, and the Department of Justice, this issue has now been raised to the public's attention. Hopefully, this will be satisfactorily resolved. That type of regulation is the type of regulation that the Regulatory Flexibility Act was specifically designed to attack and prevent.

Wherever the benefit is great, the likelihood of ignoring small business will be increased. The Regulatory Flexibility Act is most likely to be ignored by an agency involved in a rulemaking that makes a very substantial difference on the way it conducts its business. Two agencies, the Department of Defense and Internal Revenue Service, have basically said their regulations are not covered by the Regulatory Flexibility Act. I will not repeat the discussions of the Office of Advocacy, but I think it is well taken that the words "other laws" does bring defense procurement underneath the Regulatory Flexibility Act.

The Internal Revenue Service, for some reason, considers itself above the Congress. We talk about legislative veto. I think the IRS considers it has congressional veto. The IRS decided that the Regulatory Flexibility Act wouldn't apply to it. Second, the IRS decided that the Equal Access to Justice Act shouldn't apply to that, so they came back to Congress and said, "Oh, by the way, would you mind rewriting this so it doesn't bother us very much?"

I was beginning to think the IRS had decided they were going to pick on small business alone, but then I found out they came to the Hill on the Paperwork Reduction Act, to be exempted from that as well.

Now, several times the Congress has ignored these attempts to specifically exempt them. But I think the IRS should be aware of the public's concern and attitude about the way they make their rules. They should, as a Government agency, want public comment. They should go out and seek it and they shouldn't consider themselves above asking for it. If it is good Government for every other agency in this Government to ask for public comment and consider the impact of their regulations on small business, then it is good Government for the Internal Revenue Service to do it. They should not engage in regulation by ambush.

Let me turn to the issue of judicial review, because I think it is very timely, given the fact that the Department of Justice just filed its response to the briefs filed in the *Thompson* v. *Watt* case. As has been mentioned, the *Thompson* v. *Watt* case is an action involving the Regulatory Flexibility Act and whether there is judicial review.

According to Judge Greene's decision in that case, there is no judicial review. The Department of Justice went somewhat further and said the Regulatory Flexibility Act precludes judicial review. Well, my reading of the act, and the legislative history, would indicate that is not correct. Throughout the legislative history the drafters and authors of this bill, including Mr. Ireland, specifically stated that there would be review. It seems like the Department of Justice has chosen to ignore the second part of that, where it says it will be a part of review of the record as a whole.

The *Thompson* v. *Watt* case causes a lot of problems. I won't go into a discussion of the merits, but I will mention that the law is relatively clear, that whenever a statute is ambiguous as to the degree of judicial review, that the courts traditionally take judicial review. I think in this particular case it is appropriate that they do consider it.

The Small Business Legislative Council has filed an amicus brief in this proceeding, in which we set forth our arguments on why judicial review was appropriate. I have provided the subcommittee with a copy of the brief. I hope that the judicial review aspects of this will be resolved by the courts promptly.

I am fearful that the court will take the simple way out and simply rule that the Department of Interior acted improperly under the Administrative Procedure Act and did not address the Regulatory Flexibility Act. That would leave standing Judge Greene's decision, which has said there is no judicial review.

Turning to the Office of Advocacy, I am concerned that the Office of Advocacy has not chosen to intervene in this case. The issue of amicus and section 612 of the Regulatory Flexibility Act is important in American jurisprudence. To my knowledge, in no instance has that power been given to any other Government agency, that is to file, as a matter of right, an amicus brief whenever it chooses to do so. I read the law in this regard to be a very clear. The legislative history I think is also clear. Section 612 was designed to make sure that where there was a discussion or debate under 611 on judicial review, the Office of Advocacy could be heard. There may be instances where the number of cases involved place such a burden on the Office of Advocacy that they may choose not to intervene. I don't think the first case is that case. I think clearly the resources should be devoted to the first few cases so that the law can be established.

The importance of the Office of Advocacy's intervention goes to basic administrative law. Traditionally, courts give great weight to decisions of regulatory agencies. They "defer" to the expertise of the agency. It is very difficult to overcome that presumption. The Office of Advocacy's intervention goes a long way toward overcoming that presumption. The court then has two different Government agencies: In the case of the Office of Advocacy, expertise in analyzing the impact of regulations on small business, and in the case of the originating agency, the expertise in the subject matter that is involved. Given the two agencies in conflict, the court is then free to choose the course of action that is most appropriate without the traditional presumption that the agency was correct. Without the Office of Advocacy in that particular fight, small business will often find themselves up against insurmountable odds.

There has been some discussion today about the Justice Department's attempt to limit the congressionally mandated role of the Office of Advocacy. I would caution the Justice Department that the canons of ethics prohibit conflicts of interest. When this issue arose before the passage of the Regulatory Flexibility Act, the issue became involved in a postal rate hearing. At that time we advised the Department of Justice very clearly that their attempt to arbitrate between two Government agencies and represent, in effect, was a conflict of interest and violated the canons of ethics. In that particular case, they chose to allow us to file our brief as an attachment to the small business brief, so the Office of Advocacy's position was before the court.

I think this argument of conflict of interest should not be lost on the Department of Justice, because you cannot serve two separate clients. If small business, through the Office of Advocacy, has one position, and a particular Government agency has another, you will always find a conflict of interest, and under the canons of ethics no lawyer can nor should ever represent two people with divergent interests.

Let me just mention two final points. Small business owners, as Mr. Ireland has said, do not generally read the Federal Register. That is why section 609 of the Regulatory Flexibility Act requiring outreach, and section 610, is in existence. Section 610 requires that agencies must review all existing regulations within 10 years.

Compliance with these sections has been somewhat spotty. Despite the President's directive, I think we still have to watch carefully to make sure that those things happen.

Let me just say in conclusion that the law is being properly implemented generally, and it is meeting the goals and objectives set out by Congress. I am concerned with the developments regarding judicial review, as well as the Office of Advocacy's role under these judicial review provisions.

I think strong congressional support can make this law work. I would hope that it is not necessary that continued oversight hearings be run to point out the problems. The law is designed to work in the executive branch.

Thank you very much. I would be happy to answer any questions.

[Mr. Glover's prepared statement follows:]

Prepared Statement of Jere Glover, on Behalf of the Small Business Legislative Council

Good morning. My name is Jere Glover. I am here on behalf of the Small Business Legislative Council which is comprised of 70 trade associations, representing over 4.5 million small businesses. As former Deputy Chief Counsel for Advocacy, I had the honor of working with the Congress closely during the debates and passage of the Regulatory Flexibility Act. The Small Business Legislative Council was active and instrumental in securing the passage of the law.

The Regulatory Flexibility Act and its companioin bill, the Equal Access to Justice Act, were designed to change the way the Government and the Congress approached small business. All too often in the past, the Government had ignored the distinctions and differences between small and large businesses. In the area of enforcement, small businesses had often been targeted for "test cases" and as easy compliance marks. Enforcement officials knew that small businesses would not have the resources in most cases to fight agency actions. For this reason, agencies frequently targeted small business for enforcement. The Equal Access to Justice Act is an attempt by the Congress to change the enforcement attitude of Government officials. By requiring the Government to pay when it loses legal actions determined not to be substantially justified, significant behavior modification in Government officials was expected. By all accounts this has happened.

As you know, the Regulatory Flexibility Act was designed to force Government officials to go through a particular set of procedural steps in order to insure that their ultimate decisions would not be harmful to small business. Congress determined that small business was in fact being treated unfairly because agencies treated large and small businesses alike. By passing the Regulatory Flexibility Act, Congress established the principle that small businesses are unique and different. No longer would Government agencies be permitted to pass rules and regulations without first analyzing the effect on small businesses and considering less burdensome alternatives.

These two laws were designed to work hand-in-hand to improve the regulatory climate for small business.

Given the lofty goals and objectives of the Regulatory Flexibility Act, one must ask whether it is accomplishing the goals set by Congress and by the small business community. Based on the information and evidence which we have to date, it would appear that the Regulatory Flexibility Act has been generally effective. Government agencies have modified their internal procedures to require that the Regulatory Flexibility analysis be conducted before and during rulemaking. In addition, greater steps have been taken to notify small businesses of regulations which impact on small businesses. By and large, the Office of Advocacy at the Small Business Administration has been doing an effective job of monitoring and reviewing proposed Government regulations as they come out. Recent improvements in the data base of the SBA's Office of Advocacy have been of help in this process. President Reagan, in his first annual report on the state of small business, has directed all Government agencies to accelerate their review of regulations from 10 years to 5. By raising compliance visibility under the Regulatory Flexibility Act to the presidential level, this administration has clearly indicated its strong support for the Regulatory Flexibility Act.

AGENCY IMPLEMENTATION

The Regulatory Flexibility Act represents a significant and important amendment to the Administrative Procedure Act. Only once before has there been a major amendment to the Administrative Procedure Act. The Regulatory Flexibility Act unanimously passed in both Houses of Congress. This indicates the strong support for the Regulatory Flexibility Act and for the concepts upon which it is based.

Having stated that the Act is generally meeting its objectives, we now turn to specific areas of concern. While the Government generally complies with the law, specific agencies may choose to ignore the law in some instances. One recent example of this is the Federal Aviation Administration's regulations on procurement of aircraft parts. By imposing certain regulations, the FAA had, in effect, precluded small businesses from competing. The result of these regulations is millions of dollars of extra cost to the taxpayer. These regulations were proposed by the FAA, even though it conceded that the parts manufactured by a small business would be equally safe. The fact that the FAA proposed such regulations indicates that FAA's implementation of the Regulatory Flexibility Act was unsatisfactory. Through congressional oversight by this subcommittee, and the Office of Advocacy's and Department of Justice's intervention, the problem of these regulations has been raised into public view. These are the very types of regulations which the Act proposed to eliminate.

Whenever a large firm is able to control the Government regulatory process, discriminatory procedures, often under the guise of efficiency, safety or quality control, may occur and exclude small business. Moreover, the more money involved, the greater the risk that the agency will not objectively consider the Regulatory Flexibility Act when considering its regulations. Since two past Presidents of the United States and the Congress unanimously have declared a public policy concerning Government regulations and small business, I am surprised and disappointed that any agency would consider itself to be beyond the spirit and the law of the Regulatory Flexibility Act.

Apparently, two agencies—the Department of Defense and Internal Revenue Service—have stated that their regulations are not covered by the Regulatory Flexibility Act. The Department of Defense, for example, has interpreted the law narrowly. It has indicated that it is not required to propose regulations in compliance with the requirements of the Regulatory Flexibility Act with respect to DOD rulemaking on procurement matters, I would note that the Federal Acquisition Act requires the Office of Federal Procurement Policy to publish all proposed regulations in the area of procurement under this "other law." The Department should be required to conform to the Regulatory Flexibility Act. The Internal Revenue Service appears also to be taking an overly narrow view of the Regulatory Flexibility Act and its application to IRS rulings.

This brings us to S. 2170 is designed to eliminate any dispute about whether the Regulatory Flexibility Act covers actions and rulings of the Department of Defense, Internal Revenue Service, and any other agency. I feel legislation such as S. 2170 is important for two reasons. One, it would eliminate significant litigation in the future as to whether specific agency rules and regulations are covered by the Regulatory Flexibility Act. Although I believe Congress intended the Regulatory Flexibility Act to cover such agencies, this amendment would be helpful in confirming that intent. Secondly, it would be a reaffirmation by the Congress of the larger issues—the importance of relieving the regulatory burden on small business. This subcommittee has been the guardian of the Regulatory Flexibility Act. Without your support, I fear agency compliance would not be at its current level. Notwithstanding your excellent job of oversight, I feel that the law should be clarified to eliminate any dispute.

JUDICIAL REVIEW

I would be remiss if I did not tell this committee that the area of judical review is another complicated and difficult area of concern. Congress, in passing the Regulatory Flexibility Act, attempted to strike a balance between disallowing judicial review of every procedural aspect of agency action yet providing judicial review of final agency determinations. It is very clear from the legislative history that Congress intended for judicial review after the fact for agency compliance with the Regulatory Flexibility Act. The question left for the Courts is the degree of review and the timing of review. Congress did not want to create another situation where Government rulemaking proceedings were delayed indefinitely while the issue of the impact statements was litigated. In enacting Section 611, Congress limited judicial review to that time in which the entire agency rule could be considered. Recently, in *Thompson* v. *Watt, et al.*, Civil Action No. 82-0535 (D.D.C.), a Federal District Court has ruled that there is no judicial review of agency determinations under the Regulatory Flexibility Act. In *Thompson* v. *Watt*, the Court accepted a Department of Interior argument that the Regulatory Flexibility Act does not provide for any judicial review. I disagree with this aspect of that decision and the argument on which it is based. Without going into the merits of the particular case, I would note that there are several important cases which hold that even when a law specifically prohibits judicial review, the Courts have taken and will take jurisdiction of those cases. (See, for example, *Citizens to Preserve Overland Park et al.* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d, 136 (1971).) When Section 611 of the Regulatory Flexibility Act was enacted, one must assume that the Congress knew and understood the Courts' construction of when judicial review of agency determinations was appropriate. Where there is a conflict within the statute concerning judicial review, as occurs in Section 611 of the Act, the courts have taken jurisdiction and review of the matter. (See, *American Optometric Association* v. *FTC*, 626 F.2d 896.) Clearly, the statements throughout the legislative history of this Act, by members of both the Senate and the House, indicate that they expect that there will be judicial review of compliance with the Regulatory Flexibility Act.[1] The Small Business Legislative Council has determined that the Court's decision in *Thompson* v. *Watt* is contrary to the interest of the small business community and has filed an amicus brief in the U.S. Court of Appeals in the District of Columbia. I have provided this subcommittee with copies of the brief. While not wishing to enter into a detailed legal analysis of the issue of judicial review, I will simply state that any agency which proceeds on the assumption that the Courts will not review its compliance with the Regulatory Flexibility Act risks having its decisions overturned. That agency also incurs the risk of congressional oversight in hearings.

ADVOCACY

I must also state that I am disturbed that the Office of Advocacy has not chosen to intervene in *Thompson* v. *Watt*. Clearly, the Congress intended for the Office of Advocacy to have the right and ability to intervene as amicus in judicial proceedings. This is a major component of the enforcement of the Act. Section 612 of the Regulatory Flexibility Act is unique in American jurisprudence. I know of no other instance where the Congress has said that, as a matter of statutory right, a Government agency may file an amicus brief in any court. By enacting Section 612, I believe that the authors of this legislation were attempting to insure that the Office of Advocacy would intervene and argue for judicial review. Traditionally, courts have given great weight to agency determinations. By conveying the absolute right to the Office of Advocacy to intervene in judicial proceedings, Congress established a procedure where the presumption in favor of the agency's determination would be altered to allow the courts to choose between two agencies' positions and thereby determine which agency's position was the most reasonable and appropriate under the law. For this reason I believe that Congress expected the Office of Advocacy to play an important role.[2] At H. 8473 of the Congressional Record, one author of the Regulatory Flexibility Act stated, "Courts should profitably draw from the considerable experience and expertise of the Chief Counsel in considering the unchartered waters of these regulatory reforms. This provision provides an additional incentive for agencies to comply with the new law." It is obvious that the Office of Advocacy was expected to have a strong judicial role.

We also have been advised recently of attempts by the Justice Department to limit the congressionally-mandated role for the Office of Advocacy. Any attempt to restrict the Advocate's ability to comment on matters under the Administrative Procedure Act would severely transgress congressional intent. I would hope that this Chief Counsel and all future Chief Counsels resist any attempt to weaken this important role. Because of the clear legislative intent that the Office of Advocacy would file amicus briefs, I am particularly disturbed by the Office of Advocacy's failure to appear in the *Thompson* v. *Watt* case. Advocacy's resources are, of course, limited. There could be under the Regulatory Flexibility Act a situation in the future where there are so many cases pending before the Courts concerning the Regulatory Flexibility Act that the Office of Advocacy would not have the resources to intervene; but this is not the case now. This is the first case concerning this Act. I believe that the Office of Advocacy should have its views heard by the Court of Appeals at least on the critical issue of judicial review. I would urge this committee to encourage the Office of Advocacy to file an amicus brief in this matter.

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[1] Cong. Rec., S10939 (daily ed. Aug. 6, 1980); Cong. Rec., H8460 (daily ed. Sept. 8, 1980) (remarks of Rep. Kastenmeier); Cong. Rec., H8461 (daily ed. Sept. 8, 1980) (remarks of Rep. Bedell); Cong. Rec., H8463 (daily ed. Sept. 8, 1980) (remarks of Rep. Broomfield), and Cong. Rec., H8459 (daily ed. Sept. 8, 1980) (remarks of Rep. McDade).

[2] I might note that the section on judicial review and the section on the Office of Advocacy appeared simultaneously as amendments. Judging by the fact that the Senate version, which was the one ultimately passed, placed these two provisions in the bill at the same time, it seems reasonable to conclude that the authors assumed that each of these two provisions would balance the other.

I have two final points to make. Small business owners do not read the Federal Register. That is why Section 609 of the Regulatory Flexibility Act requires agency outreach to small business and Section 610, which now must be implemented within 5 years, requires agency review of all existing regulations. To date compliance with these provisions has been spotty or nonexistent. This committee and the Advocate's office should start cracking the whip on these provisions.

In summary, let me state that overall the Regulatory Flexibility Act has been properly implemented and is meeting the goals and objectives set out by the Congress. I am pleased that the deadline for review of existing regulations has been shortened to 5 years from 10 years. I am concerned with what may become a trend of agencies trying to narrowly interpret the law to exclude their activities from compliance with the law, and I regard S. 2170 as a salutory initiative to clear up any ambiguity on this topic. I am concerned with the developments regarding the judicial review provisions of the law as well with the Office of Advocacy's role under the judicial review provisions. I think that with continued strong congressional support the law can accomplish the goals for which it was designed.

MEMBERS OF THE SMALL BUSINESS LEGISLATIVE COUNCIL

American Association of MESBIC's; American Association of Nurserymen; American Metal Stamping Association; American Textile Machinery Association; American Trucking Associations; Architectural Precast Association; Association of Diesel Specialists; Association of Editorial Businesses; Association of Independent Corrugated Converters; Association of Physical Fitness Centers; Automotive Warehouse Distributors Association.

Building Service Contractors Association International; Business Advertising Council; Christian Booksellers Association; Direct Selling Association; Eastern Manufacturers and Importers Exhibit; Electronic Representatives Association; Florists' Transworld Delivery Association; Forging Industry Association; Furniture Rental Association of America.

Independent Bakers Association; Independent Bankers Association of America; Independent Business Association of Michigan; Independent Sewing Machine Dealers Association; Institute of Certified Business Counselors; International Association of Trade Exchanges; International Franchise Association; Machinery Dealers National Association; Manufacturers Agents National Association; Marking Device Association; Menswear Retailers of America.

Narrow Fabrics Institutes; National Association of Brick Distributors; National Association of Catalog Showroom Merchandisers; National Association of Home Builders; National Association of Plastic Fabricators; National Association of Plumbing-Heating-Cooling Contractors; National Association of Realtors; National Association of Retail Druggists; National Association of Trade & Technical Schools; National Automobile Dealers Association; National Beer Wholesalers of America; National Candy Wholesalers Association; National Coffee Service Association; National Council for Industries Innovation; National Electrical Contractors Association; National Family Business Council.

National Fastener Distributors Association; National Home Furnishings Association; National Home Improvement Council; National Independent Dairy-Foods Association; National Office Products Association; National Paper Trade Association; National Parking Association; National Patent Council; National Precast Concrete Association; National Shoe Retailers Association; National Small Business Association; National Society of Public Accountants; National Tire Dealers & Retreaders Association; National Tooling and Machining Association; National Tour Brokers Association; National Wine Distributors Association.

Power and Communications Contractors Association; Retail Bakers of America; Screen Printing Association International; Service Station Dealers of America; Specialty Advertising Association International; United Bus Owners of America; United Federation of Small Business; and Web Sling Association.

Mr. LYNCH. Thank you, Mr. Glover.

I assume you support Senator Dodd's bill?

Mr. GLOVER. Yes; I do.

Mr. LYNCH. Do you believe that bill goes far enough, or are there other legislative changes we should take a look at?

Mr. **Glover**. I think, given the position that the Justice Department has taken, and given the reluctance by the Justice Department to agree with the Office of Advocacy's filing of amicus briefs, the issue of judicial review is going to have to be addressed, not because I think we're wrong on the merits, but I think the courts may well ignore that issue, and not focus on it soon enough.

Agencies may get the impression that they can do whatever they want and hope that there are no congressional oversight hearings to catch them. So I think we have to clear it out and send a clear message to those agencies that we are serious and that we mean business with this law.

Mr. **Lynch**. I assume you agree with the previous witness concerning any legislative moves in the Congress, such as the Merchant Marine Committee's attempt to exempt the agencies under their jurisdiction, not only under the Regulatory Flexibility Act, but the Paperwork Reduction Act as well?

Mr. **Glover**. That is correct. I think those attempts should be stopped, and I would encourage agencies not to even consider it. Because when you go back to it, it's good Government; it makes sense. Why an agency would want to be exempted, or why an agency, even if it is not required by law to do it, would choose not to, is beyond me.

Mr. **Lynch**. One of the problems is sometimes the Regulatory Flexibility Act is viewed as somehow separate from the Administrative Procedure Act. People view it as a separate entity, when actually it is supposed to be a part of that whole process. At least I think that's what this committee's intent was.

Mr. **Glover**. One of the things we mentioned in the brief we just filed in the U.S. Court of Appeals is how much overlap there is between the APA and the Regulatory Flexibility Act. If you study administrative law, you will find that in many situations the Regulatory Flexibility Act merely codified existing law. For example, the discussion of responding to alternatives, it is very clear in the Administrative Procedure Act that an agency doesn't respond to comments suggesting alternatives, that their rule is going to be stricken and held invalid. So, to that extent, the Regulatory Flexibility Act is codifying the existing APA.

Mr. **Lynch**. Would you like to make any comments on the question of beneficial results of a regulation?

Mr. **Glover**. I was involved in a number of discussions when the law was being considered. In the legislative history, Congress appeared to not trust Government to choose which was beneficial and which was not, and to require analysis in both cases. Why an agency would not want to do an analysis that says "this is going to be great for small business," I don't understand. One, ordinarily would want to make that a matter of pride. We are doing this, we are reducing this burden, it's going to save small business $5 or $10 million. It's something an agency should be proud of. They should be able to come to the Congress and say what they're doing. Again, it should help out, when there is a congressional oversight hearing, for an agency to say, "Yes; I did increase the burden on small business with this regulation, and there's a good reason for the regulation. By the way, our agency did 10 other regulations that helped small business and look how much we helped them." It's a great argument to be able to come back and respond to Congress when it asks.

Agencies and Government officials are sometimes lazy. They just don't want to do any work. Unfortunately, both the APA and the Regulatory Flexibility Act require that they do some minimum amount of effort.

Mr. LYNCH. Concerning the reviews being done by most agencies—and the Internal Revenue Service has a 5-year plan already out—is the Legislative Council planning to comment? We find ourselves in the position that small businesses have long complained about burdensome regulations, and now we actually have an opportunity to comment upon them. We would certainly hate to find ourselves in a situation where agencies go to the public and ask for comments, and then they say commented.

Mr. GLOVER. Traditionally, small businesses have not responded. There is a general distrust of Government by small business. They have the attitude that, even if they say something, the Government won't listen; that the Government is going through a sham proceeding by asking for comments which they will ignore.

Now, over time this perception among small business will be eroded when small business realizes the Government is responding to their requests. It is worthwhile to spend the time and energy to say something.

We are up against those years of presumption in small business' mind that it doesn't do any good. Hopefully, we will be seeing more and more small businesses commenting; but I think that will come as agencies respond to those comments. When you see a situation like *Thompson* v. *Watt,* where there were 1,800 comments objecting to that regulation, and the Department of Interior dismissed them with one sentence that said they're not substantive; you know, it doesn't give a lot of trust. It does not encourage those 1,800 small businesses or anyone who knows about them to write their Government and say "Hey, don't do this." So I think it will be a time before small business really believes the Government is going to listen or care.

Mr. LYNCH. I have one final question.

You commented upon the difficult position that the Chief Counsel is in, in deciding when he should go to court and when he shouldn't. The early cases are the most important ones. But looking down the road, assuming we get by the Justice Department hurdle, or around it, or under it—we don't care which way we go—do you have any suggestions to offer on how the Advocate can decide which case is the one to go to court on? I am sure there are going to be a lot of cases, and we realize that the Advocacy Office only has limited staff.

Mr. GLOVER. I think in the normal decisionmaking process, the factors that determine which cases they file comments on—I assume they're still the same as when I was there—is, you first look at the impact the proposed regulation is going to have. You decide, are there any legal or constitutional issues that need to be addressed; will advocacy's involvement make a difference? We look at the number of firms that are going to be affected by the proposed regulation. We look at the severity of the impact that is going to occur, and then we look at the degree of change that the Office of Advocacy can effect.

If we see a situation where small businesses are very well represented, that their position is being well presented, it may not be as important to intervene that case as in a case where nobody is fighting for small business. The Office of Advocacy will have to balance those factors, and that will be a judgment call. The effectiveness of the Chief Counsel will be determined on how well he balances those factors. Does he choose to intervene in the right cases? If he is a good chief counsel, he will pick the right cases and he will have a significant impact. If he is not a good Chief Counsel, he will pick the wrong cases and he will have no impact. But that is a judgment call in the final determination by the Chief Counsel and his staff.

Mr. LYNCH. Mr. Topping.

Mr. TOPPING. In fairness to the agencies, do you think there should be a Regulatory Flexibility Act for small hospitals and for small colleges and other institutions?

Mr. GLOVER. To the extent those organizations are small businesses, they are already covered——

Mr. TOPPING. No, they are colleges and hospitals.

Mr. GLOVER. To the extent they are nonprofit——

Mr. TOPPING. Many small hospitals indicate that they are affected differently from large hospitals, and small colleges indicate they are affected by regulations more than large universities are. By the same token, they indicate that they educate more students than the large universities. Do you think there should be a Regulatory Flexibility Act for them in fairness, and good government?

Mr. GLOVER. I think you have a situation where the law applies to nonprofit organizations. "Small entities" is the term used in the law. Small entities includes nonprofit organizations. To the extent that a small university meets the definition of a small entity, they would be covered under the law, as it presently exists. To the extent they are a for profit business, and they still fit within the small business definition, they would still be covered. So I think the law provides for those entities, and I think there is coverage, at least in some of the cases.

Mr. TOPPING. That's all I have.

Mr. LYNCH. Thank you, Mr. Glover.

At this point we will recess the hearing until the chairman can return. I should tell the witnesses that he does want to hear from both the Internal Revenue Service and the Department of Defense witnesses.

There are now a series of 5-minute votes, and we estimate he will be back at around 11:15. We apologize for the delay, but if he left, he would have to keep going back and forth because each vote is only 5 minutes long.

[A recess was taken.]

Mr. IRELAND. The subcommittee will come to order. My apologies for those who had to wait.

Our two final witnesses, as you well know, are from the Department of Defense and the Internal Revenue Service. With the indulgence of the Department of Defense representative, I would like to call at this time Mr. Egger of the Internal Revenue Service because I understand he has an appointment he must get to.

You may proceed. Welcome.

TESTIMONY OF ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, ACCOMPANIED BY FRED GOLDBERG, ACTING DIRECTOR, LEGISLATION AND REGULATIONS DIVISION, OFFICE OF CHIEF COUNSEL, IRS

Mr. **EGGER**. Mr. Chairman, I am very pleased to be here today to talk about the Service's position on the applicability of the Regulatory Flexibility Act of 1980 to the operations of the Internal Revenue Service. Here with me is Fred Goldberg, who is Acting Director of the Legislation and Regulations Division of our Chief Counsel's Office, and who will also be available to answer any particular questions that you may have at the conclusion of my brief statement.

The Regulatory Flexibility Act of 1980 requires all Federal agencies, in developing rules that would have a significant impact on a substantial number of small businesses, to publish a "regulatory flexibility analysis" stating what that impact might be under alternative methods of implementing those rules. It encourages agencies to adopt the least onerous approach to such rulemaking. Overall, the act sought to foster greater sensitivity to the needs and problems of small business.

The act, in defining the term "rule," adopts the definition used in section 553(b) of the Administrative Procedure Act. The result of adopting that definition is that a regulatory flexibility analysis must be prepared only for all "legislative rules," those promulgated by an agency pursuant to a specific grant of legislative power by the Congress. That definition excepts "interpretative rules" which do not rest on any specific statutory delegation of authority, but are promulgated under the authority of delegated interpretative power to assist the implementation of a statute by an agency. Therefore, no analysis is required for interpretative rules. Unless excepted because such rules do not impact on small entities, legislative rules must be published with a regulatory flexibility analysis.

It is our position that while no Federal agency is exempt from the act, the act does differentiate between types of regulations, that is between legislative and interpretative rules, and between legislative rules which have a substantial impact on small businesses and those which do not. Although most proposed rules under the Internal Revenue Code of 1954 are published in the Federal Register, and solicit public comments, the majority of our regulations are interpretative. The Treasury Department agrees with this analysis.

Of course, in those instances where Congress has specifically delegated authority to the Service to write legislative regulations, we have published an analysis as required by the act. In issuing interpretative regulations, however, the Service is not delegated authority to provide exceptions for small businesses. Unless Congress evidences a contrary intent, the provisions of the Internal Revenue Code are to be applied universally to all taxpayers whether they are small or large.

Where Congress has indicated that special rules should be applied to small business, the Service does consider exceptions for small businesses. For example, the recent Tax Equity and Fiscal Responsibility Act provisions on completed contracts differentiate between large and small businesses. The regulations under those sections will follow those rules. Similarly, section 474 of the code and the accompanying regulations provide a special rule that allows small business to use a single inventory pool for LIFO inventory purposes.

We believe our interpretation of the act and our related actions are correct, and based on solid legal grounds. The Service is concerned about small businesses, and I will discuss this subsequently. We believe we have done much to aid the cause of small business in the tax area.

The IRS for many years has provided tax advice and assistance specifically aimed at small businesses. For example, "Your Business Tax Kit" is designed to be provided to operators of small businesses as they are formed. It contains all the necessary tax forms and instructions for a new businessman or woman, and is available without charge at local IRS offices. Approximately 200,000 are given away annually.

Our small business tax workshops are designed to increase overall awareness of business tax responsibilities, with special emphasis on employment taxes. In a typical year, over 40,000 people attend these workshops nationwide. In this same vein, the Service participates in various clinics, conferences, and workshops sponsored by the Small Business Administration in conjunction with universities, civic groups and so on, covering a wide variety of subjects.

The "Tax Guide for Small Businesses," Publication No. 334, is issued annually by the Internal Revenue Service in cooperation with the Senate Select Committee on Small Business and the SBA. It is a nontechnical but comprehensive explanation of relevant tax laws and regulations, and includes a tax calendar to guide the tax-planning activities of businessmen and women.

The Service also produces films on subjects of interest to business owners and operators. "Hey, We're in Business" for example, covers recordkeeping requirements, obligations to employees, tax deadlines, and IRS assistance. Through television and group showings, we estimate that over 1.8 million individuals have viewed this film. These films, too, may be borrowed from local IRS offices without charge.

Mr. Chairman, we believe that such organizations such as the NSABA and the NFIB could be very helpful to us in publicizing the availability of these materials to small business. In addition, when new members for my advisory group are sought later this month or early next month, we will plan to solicit small business groups for nominees. The purpose of this group is to advise the Commissioner on matters of tax administration.

I should mention that the National Society of Public Accountants, whose clientele by and large tend to be small businesses, have participated in the Commissioner's Advisory Group for a number of years. When I met with the NSPA about 2 months ago in Florida, I invited them to formulate a committee or a group of representatives to meet with me and my staff on a national level to attempt to solve some of the problems which they brought to our attention. In fact, when I was in Florida, they brought to my attention a problem concerning timing of the quarterly reports on employment taxes. As a direct result of that, the Chief Counsel's Office has looked into a reconsideration of those rules.

Finally, the Service will continue its support of practitioner institutes, which have proven valuable to both tax practitioners and small businessmen and women in understanding various tax law subjects, and to the IRS in terms of enhanced voluntary compliance. In fiscal year 1983 this support will be provided through the Intergovernmental Personnel Act, which enables the Service to enter into reimbursable agreements with institutions of higher education and certain other organizations. Collectively, these items indicate the Service's commitment to helping small businesses meet their legitimate tax obligations in the least burdensome way.

Mr. Chairman, we believe the Service's interpretation of the Regulatory Flexibility Act of 1980 is both factually and legally sound, and is based on a legitimate reading of the act as written. We also believe the Service has demonstrated a commitment to assisting small businesses wherever and whenever possible, and we plan to continue these activities despite tight budgets and shifting priorities.

Mr. Chairman, this concludes my testimony. Mr. Goldberg or I will be very pleased to try to answer any questions that you or other members may have.

Mr. **Ireland**. Thank you very much, Commissioner.

I would like to ask you if you could comment on my interpretation of your statement concerning small business; certainly you feel IRS rules, for the moment, not distinguishing legislative and interpretive whether they be interpretive or legislative that they do have an impact on small business. Is that correct?

Mr. **Egger**. Certainly.

Mr. **Ireland**. In other words, as you pointed out in the new tax law, that yes, it is written in there that you must address small business. But your overall thinking is that an awful lot of the things the IRS does have a tremendous impact on small business and, therefore, you have set up an advisory group. Am I correct in that interpretation?

Mr. **Egger**. Yes, indeed. We want to be as helpful to small business as we can possibly be. We recognize, Mr. Chairman, that really small businesses, those operated by individuals or by families and so on——

Mr. **Ireland**. Yes. The ones with less than 10 employees, there are probably 8 million out of the 13 million in business.

Mr. **Egger**. Right. We recognize they don't have the access to the professional assistance that the larger businesses have, so we try very, very hard to be available——

Mr. **Ireland**. It obviously is your interpretation of the technical aspects of the law that legislative rules are covered by the Regulatory Flexibility Act, and interpretive rules are not. What I would like you to respond to is a statement by the Chief Counsel for Advocacy of the Small Business Administration, who says:

While the Regulatory Flexibility Act does not technically apply to the IRS's interpretative rules, there is no law that bars them from conducting analyses and including them in the Federal Register notice.

You are saying you don't have to under the law, and the Advocate is saying that is correct. But there is also no law that prevents you, if you are truly interested, as you say you are in the welfare of small business and the effects of it, there is nothing to keep you from doing it. So it would seem to me, if you are truly interested in small business, you wouldn't be taking this hard line, that interpretive rules don't apply, but instead you would be saying, "Hey, look, we realize that this impacts on small business, and there is no law that says we have to do a regulatory flexibility analysis for interpretive ones, but there is also no law that says that we can't, and since we are truly interested in small business, we are going to do this and follow it through."

Mr. EGGER. Let me comment on that, Mr. Chairman.

I recognize that is a fairly—perhaps even broadly—held view, that IRS is simply hiding behind whatever the legal rules are.

Mr. IRELAND. It seems like you just don't want to do the work in the area, it is not just the IRS. Bureaucrats find some way technically not to do it, and then don't do it.

Mr. EGGER. Let me comment on that.

To begin with, I assure you that is not true. But let's look at what the intent of the Regulatory Flexibility Act is here. The intent is to search out alternative methods, alternative rules that can apply to small business that would not apply to other businesses. Under the interpretative rules, with rare, rare exceptions—and I can't even think of one at the moment—we simply don't have that option. We do not have that kind of discretion, that we can say "OK, here's a rule that Congress wrote, but we're going to say that it doesn't apply to small business."

Mr. IRELAND. Let me interrupt for a second, because I think that's the key.

It seems to me there is no reason, if you are truly interested in small business, that you can't say, "All right, we are going to make an interpretive rule a number of months in the future, and we have this under consideration. We know the rules, whatever kind we put out, affect small business." Now, there is no reason, on an interpretive rule, that you have to solicit the advice and counsel of the small business community. But there is also, as I maintain—and I think you would agree—nothing that says you can't do that. So it would seem to me that, before that rule is ever made, you can step up and say, "Small business what's this going to do to you?" The law doesn't say that you can't do that, and maybe it would tremendously influence that final decision of how that rule would be worded.

Mr. EGGER. That is exactly what we do do in the sense of publishing almost all of our interpretative regulations in proposed rulemaking form, notwithstanding that under the Administrative Procedure Act we are not required to do that. But we do, as a matter of practice, and we have for years, put the regulations out as proposed rulemaking and invite public comment, and we hold hearings. Only one person has to ask for hearings, and we will hold hearings on any regulation and listen to the comments.

Small business and their representatives are far better equipped to tell us what the impact truly is on a given regulation under the tax laws than we are to sit in an office here in Washington and attempt to put ourselves in the place of every small business operator around the country. So what we need to do is to have that kind of input from the small businesses and those who represent small businesses.

Mr. IRELAND. Would you seek automatically, as a uniform procedure, the advice and counsel of the Chief Advocate?

Mr. EGGER. We frequently get comments from governmental agencies. We have testimony from Members of Congress. We have testimony from business groups, from individuals and so on. The door is wide open.

Mr. IRELAND. It would seem to me that you would use the advocate as regular procedure.

Mr. EGGER. As I said, we publish in the Federal Register, and in the case of most regulations of any significance we also issue press releases so that they are well publicized. We do invite comments. We extend the comment period invariably from the required 30 days under the act to 60 days as a general proposition, giving, in the case of complicated regulations, any extension of time. There is never a time when anybody comes in, even after the hearing and before we have made the regulation final, that we wouldn't be open to discussion, or accept submitted written comments. So that there is every opportunity in the world for small business or anybody whatever——

Mr. IRELAND. My question is, why not use the mechanism that is already there under the Regulatory Flexibility Act.

Mr. EGGER. We think we are using it, except that we cannot, because the law doesn't permit us, to make exceptions and to——

Mr. IRELAND. Well, the law doesn't say that you can't do that. You are correct, that you technically don't have to, but the law doesn't say that you are prohibited from doing it.

Mr. EGGER. I'll tell you, if I start making exceptions——

Mr. IRELAND. This isn't any exception.

Mr. EGGER. I think I'll be in difficulties.

Mr. IRELAND. I don't see your point. If we take what you're saying, that you don't technically have to play the reg flex game, it doesn't say anything prohibits you from doing it.

Mr. EGGER. The only thing that the Regulatory Flexibility Act requires that isn't already in our procedures is that we search out alternative methods for accomplishing the objective, which can apply to small businesses. We don't have that latitude under the Internal Revenue Code; that's what I'm saying.

Mr. IRELAND. Why don't you? There is nothing that says you have to, but there is nothing that says you can't. Nowhere in your testimony have you, nor has anybody else said, that you can't do it. To me, it is difficult to have you say, "Gee, we want to do everything for small business." You have the opportunity under those rules to do everything. There is nothing in the law that says you can't do it, and yet you won't do it.

The small business community fails to understand that attitude. You know, you can't have it both ways.

Mr. **Egger**. That is simply not true. It is a question of what is it that we can properly do.

Mr. **Ireland**. You can do everything that the Regulatory Flexibility Act says; there is nothing that prohibits you from doing that. Am I not correct?

Mr. **Egger**. If you have some specific example of what you're telling me, because I must admit——

Mr. **Ireland**. You can take one specific example. There is nothing called for in the Regulatory Flexibility Act that you are prevented from doing. Now, it may be that you are technically correct, that you don't have to do it on interpretive rulings, but there is nothing to say that you can't. You could do it.

Mr. **Egger**. I think I'm telling you, Mr. Chairman, that everything that we can properly do with respect to interpretative rules is being done already under our procedures with respect to the Administrative Procedure Act.

I need an example of what you're telling me we can do.

Mr. **Ireland**. Let me read this, which was in the NFIB testimony:

> In 1969, Congress authorized the IRS to issue regulations to provide clear guidelines for distinguishing debt from equity. IRS proposed regulations in March 1980, and reproposed regulations in December 1981. These regulations were slated to become effective on July 1 of this year. Throughout the development of the debt-equity regulations, IRS steadfastly maintained that the regulations would have no tax impact on small firms. NFIB and other interested parties, having conducted their own analyses of the proposal, found the evidence to be quite the contrary. In fact, the bottom line of our analysis was that the regulations would be "a real disaster for both the IRS and small business. . . . This proposal is not salvageable in any form." Heavy lobbying by concerned Members of Congress, NFIB and other groups, insured that these regulations in their present form will not see the light of day.

It seems to me that not being prevented by the law from playing the reg flex game, as we call it, would certainly have prevented that kind of thing.

Mr. **Egger**. What would we have done that——

Mr. **Ireland**. You would have done exactly what you would have done if it was a legislative rule. You say on legislative rules that you go through the regulatory flexibility analysis, but you won't do it for interpretive rules. There is nothing to prevent you from doing it for interpretive rules. Again, even if we acknowledge you don't have to, there is nothing to prevent you from doing it. Our question is, if you are truly interested in small business, why don't you, since there is nothing to prohibit you from doing it?

Mr. **Egger**. Mr. Chairman——

Mr. **Ireland**. You have not told me anything that prohibits you from doing it.

Mr. **Egger**. You still haven't told me what it is that we should have done under 385 regulations.

Mr. **Ireland**. You should do what you do for legislative rules. You can take any regulation that you've got that is a legislative rule, and whatever you're doing along that line, which you hold up as a good example of complying with it all those things are eligible for you under interpretive rules. There is no prohibition. So why not do it?

Mr. **Egger**. Where we have legislative authority, in effect, we can draw distinctions. But we simply do not have that authority in the case of——

Mr. **Ireland**. Wait a minute. You can have an interpretive rule that—— Nothing prevents you from making distinctions for an interpretive rule. There is nothing at all that prevents you from doing that.

If you could, cite to me anything that prevents you. There is nothing that prevents you from doing it in the current laws of the United States. If you can tell me there is, we can solve the problem.

Mr. **Egger**. Let's take your example. The section 385 regulations require that the Treasury Department issue regulations which define what is debt and what is equity. There is no room, to the best of my knowledge, for anyone to say, "Well, this is debt in the case of large business, but it is not debt in the case of small business."

Mr. **Ireland**. There is nothing to prevent you from doing it, however. There is nothing that says you have to.

Mr. **Egger**. There most certainly is. We couldn't possibly interpret the law to apply differently to different taxpayers.

Mr. **Ireland**. I don't think there is——

Mr. **Egger**. We can also——

Mr. **Ireland**. Can we have the Service's legal interpretation that there is something to prevent you from doing that? Can we ask for that for the record?

Mr. **Egger**. You certainly may, but I want to insist that——

Mr. **Ireland**. I think this will resolve what we're talking about.

Mr. **Egger**. I want to insist that we are not and have not taken that as a position, that there is something that prohibits us. What is required is that I, as the administrator of the tax system of this country, apply these laws uniformly. I do not have discretion to say that this taxpayer can do it one way, and that taxpayer can do it another. If Congress writes the law that way, fine; I have that option. But I do not have it in the case where that option is not provided by the law itself.

All I am doing, in the case of these regulations, is putting out an interpretation.

[The material referred to above follows:]

Question. Is the Service prevented by law from providing different treatment for small businesses under the Internal Revenue Code of 1954?

[LEGAL ANALYSIS]

A. Section 7805 of the Internal Revenue Code of 1954 (hereinafter Code) authorizes the Secretary of the Treasury to prescribe regulations for the proper enforcement of the Code. This authority under 26 CFR section 301.7805-1 is delegated to the Commissioner of the Internal Revenue (hereinafter Commissioner).

As such, the Commissioner is authorized to issue regulations if expressly authorized by Congress or under section 7805 for the proper administration of the Code. In either instance, the Commissioner only may issue regulations which are reasonable expressions of congressional intent and which are not in conflict with the statute. *United States* v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L. Ed. 2d 537 (1967). In general, the authority conferred on the Commissioner to promulgate regulations is not the power to legislate. *Estate of Lovett* v. *the United States*, 621 F.2d 1130 (Ct. Cl./

1980).[1] In *Lovett,* the Court of Claims held that Treas. Reg. section 1.951-3 was contrary to the statute and, as such, was invalid.

Similarly, in *H. Wetter Manufacturing Company* v. *United States,* 458 F. 2d 1933 (6th Cir/1972) the Court of Appeals held Treas. Reg. section 1.562-1(a) to be invalid. In a unanimous decision, the Court ruled,

"Because Congress has delegated to the Secretary of the Treasury only the power to issue regulations for the enforcement of the revenue laws, and because this power is limited to carrying into effect the will of the Congress as expressed by the statutes, the express words of the Code must control when they conflict with a regulation. The Secretary may not broaden or narrow the specific provisions of the law." (At p. 1035.)

Further, the Court concluded,

"Where the provisions of an Act are unambiguous, and its directions specific, the Secretary of the Treasury has no power to amend the statute by regulations". (At p. 1035.)

This standard has been employed by numerous courts in cases relating to the proper enforcement of the Code. See *General Electric Co.* v. *Burton,* 372 F. 2d 108 (6th Cir/1967), *Buse* v. *Commissioner of Internal Revenue,* 479 F. 2d 1147 (7th Cir/1973).

Therefore, administrative regulations are not law but are interpretations of law. Such regulations are not independent authority but are accepted expressions of congressional intent made by the Commissioner whom Congress has entrusted with the administrative responsibility for carrying out its purpose.

In certain instances, Congress has enacted statutes which treat taxpayers differently due to their size. For example, section 474 of the Code provides that eligible small businesses which use dollar-value LIFO may elect to use one inventory pool for any trade or business. Section 542 excepts from the definition of "personal holding company" any small business investment company licensed by the Small Business Administration. Section 1244 allows ordinary treatment for losses incurred with respect to small business stock.

The right to treat similarly situated taxpayers differently due to their size is the right of Congress, not the Commissioner. Administrative regulations which interpret statutes enacted by Congress may not broaden those statutes so as to include or exclude areas, persons or articles with which Congress did not deal. Accordingly, the Commissioner is not delegated administrative authority to treat small businesses in a manner which is unlike the treatment of other taxpayers unless Congress evidences an intent to do so in the statute.

In certain instances, Congress delegates legislative authority to the Commissioner to issue substantive regulations (e.g., sections 103(c), 385(a), and 1502). Since the Commissioner exercises legislative authority when issuing a substantive regulation, he has the power to differentiate between small businesses and other taxpayers. A substantive regulation, however, must be issued in accordance with 5 U.S.C. § 553. As such, substantive regulations are within the scope of the Regulatory Flexibility Act (P.L. 96-354, 94 Stat. 1164) and if such regulations impact on small entities then a regulatory flexibility analysis must be published.

Mr. **Ireland**. I'm not sure if this isn't at the heart of our disagreement. You're saying you have to wait to be told. I am saying you haven't been told one way or the other, so you can do it. If the spirit is there, you can do it, because you are not prevented from doing it.

The bottom line is that you may say you're treating small business uniformly, but the end result is, on many of these things, that the impact of your interpretive rules as a result do not treat people equally. That's the whole problem.

I can't tell you how many speeches I made pushing the Regulatory Flexibility Act, and said, "This is not something new; the IRS has had a two-tiered operation for many years. Look at the 1040 form."

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[1] "It is equally true, however, that the power of the Commissioner to promulgate regulations is not the power to make law but only the power to carry into effect the will of Congress as expressed by the statute. *Manhatten General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)." (At p. 1135.)

There you realize that unless you have a two-tiered system you will treat some different than others. So it seems to me we could conceivably make a great step forward if we acknowledge, (1) that you are not prevented from doing this, and (2) a tiering in an interpretive rule could in actuality bring about evenhanded treatment and fulfill your already stated interest in making sure that this small business is——

Mr. EGGER. Mr. Chairman, we have had these section 385 regulations out in the open here since 1980. I have yet to see a detailed analysis of where those regulations treat one taxpayer different from another. I can assure you that since they are not in final form yet anybody, including small business groups, is invited to come in and tell us how we should write those things differently.

Mr. IRELAND. I think the debt-equity issue that I just cited is a good example.

Mr. EGGER. That's exactly the one I'm talking about. It's not in final yet.

Mr. IRELAND. We have a number of examples. I think we have an area here to work on. If I could have for the record the reflection of the Service on the fact that you are or are not prevented from doing this, we would have a place to start.

Let me ask the staff director here if he has some questions for the record that we would like to ask.

Mr. LYNCH. Mr. Commissioner and the gentleman with you, could you for the laymen present give us an example of the difference between a legislative rule and an interpretive rule? Let me perhaps propose an example.

The Congress has just passed a new tax bill. In there, there are now going to be requirements, as I understand it, on businesses for certain withholding of tips. Obviously, I think that is another burden that is going to be placed upon the small businessman. Now, will regulations implementing that be legislative rules or interpretive rules?

Mr. EGGER. I'll let Mr. Goldberg answer that.

Mr. GOLDBERG. Generally, I believe those would be interpretative regulations. If I can carry further the point that was raised before, that particular provision provides that the reporting requirements of that statute are not applicable to organizations which employ 10 or fewer employees. From our perspective, that reflects a congressional judgment that the reporting requirement is properly imposed on organizations of 11 or more employees, but is not properly imposed on organizations of 10 or fewer employees.

I do not believe that it would be appropriate, as a matter of law, for us to say that even though Congress has exercised its judgment in that fashion, we are going to exempt organizations employing 50 or fewer employees, just as I think it would not be proper for us to say, despite what Congress has done, we are only going to exempt organizations which employ five or fewer employees.

Mr. IRELAND. Let me interject there a further question. You might say it is not in there, but there is nothing in that law, nor any preceding law, that says you can't; am I correct? If you came out with that ruling and you said you were going to do 10 and under this way, 11 to 35 this way, and we're going to do 36 to 136 another way, and 137 on up another way. We're going to do this because in that way the burdens of reporting and everything else are going to come out even economically for everybody else, there is nothing in the law that prevents you from doing that? It doesn't say you have to, but there is nothing that prevents you from doing it.

Mr. GOLDBERG. I think that's a fair observation. All I can simply say is our intention in preparing these regulations is first to work with all the affected industry groups—large, small, hotels, and restaurants—to develop as many options for the entire taxpaying public as possible, no matter what size, to as best possible accommodate all of their needs. I think in that sense the point you make is very valid.

Mr. IRELAND. That's my key point, and that is what regulatory flexibility is all about. It would seem to me there is a great opportunity there because you are not prevented from doing it. If you went through regulatory flexibility, you might find there ought to be several grades of 11 and up to do it, and you can do it.

What comes to me from your testimony is, "If we haven't been told, we shouldn't do it." But that is not so by your own answer to my question.

I won't belabor it longer. What I would like to do is encourage this concept. Just because it says you don't have to do it a certain way, it doesn't mean that you can't.

Excuse me for interrupting.

Mr. LYNCH. Just to carry it further, if I may use an example. When the IRS decides to audit somebody, obviously it has to be a different situation if they decide to audit General Motors or Joe's Restaurant. For example, if the IRS decided to come up with a policy, which we have been told in one region for a while they did, that an audit would be conducted on the premises of the business, it would be much different if the IRS decided to go to General Motors because they could go to an executive suite or whatever, rather than going to Joe's Restaurant. If they decided to audit Joe on the spot they would interfere with the business. Joe could be the most honest guy in the world, but word would get around the neighborhood that the IRS is over at Joe's Restaurant.

The Senate held hearings in 1980, and came up with a long list of recommendations on IRS enforcement procedures, IRS levy matters, et cetera, and they came up with about 3 pages of recommendations where they really felt things should be changed because small businesses were being impacted by these policies.

The purpose of the Regulatory Flexibility Act was to try to head all of this off in the beginning by getting comments from small business, that if only you do it this way it would be more helpful.

Mr. EGGER. The Regulatory Flexibility Act, as I understand it, doesn't go to the question of our operations. I think it deals with regulations. The selection of returns for examination is not done on any question of whether you're a big business or a small business, other than as it meets our criteria.

Now, I can assure you that we audit a much higher percentage of large businesses than we do small businesses. The small businesses, by and large, are selected on the basis of those returns which are most likely in need of adjustment. That is to say, our so-called DIF formulas and the other means through which we make our selection is done on the basis of the return itself. As to whether we do it on the premises or not, when we are doing a field examination—that is to say, a regular revenue agent exam—we go to where the books and records are kept, rather than asking the taxpayer to pack up all of their books and records and bring them into the office. I can assure you, if we did that, we would get a lot more complaints than if we do it the other way around. So, you know, we are sort of caught in the middle in that sense.

If we said to all small businesses, "Load up your records and all your invoices and all your bills paid and bring them all into our offices," I would have at least 100 complaints the next morning, many of them from Members of Congress. What we are trying to do here is do it in the most efficient manner possible. Regular auditing of income tax returns carries with it no suggestion of anything wrong or anything improper. It is a perfectly routine part of tax administration, in much the same fashion as financial statements are audited by independent accountants, in the case of other businesses.

Mr. LYNCH. Has the IRS responded to those recommendations by the Senate Governmental Affairs Committee?

Mr. EGGER. I really do not know that. I would be happy to supply that.

Mr. LYNCH. If you could provide the response to all their different recommendations.

Could you just briefly explain the makeup and goals of your Small Business Advisory Group?

[The material referred to above follows:]

96th Congress }
2d Session }

COMMITTEE PRINT

INTERNAL REVENUE SERVICE COLLECTION PRACTICES

IMPACT ON SMALL BUSINESSES

A REPORT

PREPARED BY THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

OCTOBER 8, 1980

Printed for the use of the Committee on Governmental Affairs

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III. RECOMMENDATIONS

(A) *To address the Subcommittee's findings regarding excessive and harsh enforcement actions against small businesses*, we recommend the following:

(1) Liens:

(a) 26 U.S.C. 6325(b)(1) be amended to require that IRS make an assessment of the fair market value of liened property and that IRS retain a lien on a part of the property equal in value to no more than double the amount of the tax delinquency.

(b) 26 U.S.C. 6325(b)(2) be amended to require that IRS assess the fair market value of levied property and promptly discharge the lien as to any part of the property where the taxpayer pays an amount equal to the value of the government's interest in the liened property, or where it is determined that the government's interest in the property has no value.

(c) 26 U.S.C. 6325(a) be amended to set a specific time limit by which a lien release must be effected following satisfaction of the debt secured by the lien.

(2) Levy:

(a) 26 U.S.C. 6331 be amended to require that current notice provisions in Section 6335 applicable to seizures be extended to levy actions as well. Specifically, the amendment should require that as soon as practicable after levy of taxpayer property, notice in writing shall be given to the taxpayer, or be left at his home or business. Specifics of the content of the notice should be similar to those mandated for seizures in Section 6335.

(b) Internal Revenue Manual Policy Statement P-5-34 should be revised to read in part: "The facts and circumstances of the particular case must be thoroughly considered before a decision is reached to *levy against a going business* or to seize a going business and offer it for sale under levy proceedings." (revision in italics)

(3) Seizure:

(a) IRS should immediately issue a reaffirmation and clarification to all regional, district and field offices emphasizing that no-equity seizures are prohibited in all cases, and not only in situations where a writ of entry or judicial approval is required.

(b) IRS should immediately issue a memorandum reiterating formal national policy toward seizures of on-going businesses. While an August 15, IRS memorandum addressed this concern briefly, the Subcommittee believes that it is important to give separate emphasis to this issue. The memorandum should emphasize Internal Revenue Manual Policy Statement P-5-34, which provides that seizures of a going business be made only after thorough consideration of all the facts and circumstances, and then only after every reasonable effort has been made to collect the tax on a voluntary basis.

(4) Installment Pay Plans: Internal Revenue Manual should be revised to require that installment pay plans be used for business taxpayers with no prior history of delinquent trust fund accounts, in the absence of unusual circumstances. Business taxpayers placed on installment pay plans should also be required to pay into Special Trust Fund accounts for the duration of the plan to ensure that no further delinquencies are incurred.

(5) SBA Interagency Agreement: IRS should report to the Subcommittee within 30 days the specific steps already taken and those planned to ensure that the intent of its 1974 Interagency Agreement with the Small Business Administration regarding small business delinquencies is being met.

(B) *To address the Subcommittee's finding regarding IRS' principal reliance on closed-case and seizure and levy statistics without knowledge of the cost effectiveness or debt recovered*, we recommend that:

(1) IRS national office discontinue disseminating statistics on enforcement activity and closed-care inventories pending the results of IRS' proposed study to research the disparity of those statistics and the correlation, if any, between those statistics, the use of various enforcement tools, and actual debt recovered.

(2) IRS immediately institute a mechanism for regularly collecting, tabulating, and disseminating percentage and amount of debt recovered by district and region.

(3) IRS expand its proposed study to consider data on cost effectiveness (costs expended compared to debt recovered) of levy, seizures and sales, installment pay plans, and specifically consider the following:

(a) for seizures and sales—number of seizures, number of sales, gross proceeds from sales, funds applied to tax liabilities, personnel and other overhead costs, number of releases, reasons for releases.

(b) for business installment agreements—number of agreements, default rate, proceeds, administrative costs.

(4) IRS report regularly to the Subcommittee on the study's progress and that copies of all findings, conclusions and recommendations be reported to the Subcommittee for review and comment prior to the issuance of IRS' final report, now scheduled for January, 1981.

(C) *To address the Subcommittee's findings regarding managerial abuse of supervisory review authority*, we recommend that IRS immediately issue a policy clarification that group manager review of

Revenue Officer seizure recommendations be limited to review and approval of proposed seizures only, and that group managers are prohibited from mandating seizures.

(D) *To address the Subcommittee's finding regarding IRS' misuse of closed-case and enforcement statistics to impose production pressures and quotas on its employees*, we recommend that IRS submit to the Subcommittee copies of the requested regional plans for implementation of its August 15, 1980, memorandum regarding the use of statistics.

(E) *The Subcommittee requests that within 30 days IRS submit a statement of actions taken in response to each of the recommendations made in this report.*

IV. DISCUSSION

A. OVERVIEW

During the past several months, the Subcommittee has received numerous complaints from owners of small businesses around the country alleging increased and precipitous use of forcible IRS collection actions to recover delinquent employee withholding taxes. IRS estimates that at least 60 percent of all its seizures are directed at business taxpayers;[8] a 1978 Government Accounting Office (GAO) report set that figure at 73 percent in 1975.[9] As a result, delinquent business taxpayers are hardest hit by increased enforcement activity.

Business employers are required to withhold and periodically deposit their employees' social security and Federal taxes in a trust fund account at an approved bank. Reports of the amount deposited are filed quarterly with IRS.[10]

The system of withholding and deposits has a two-fold purpose. It creates a constant flow of revenues into the Federal Treasury, and it helps ensure that individual wage earners will not become tax delinquent. This system is a vital means of revenue collection and constitutes a major portion of IRS' overall collection activity. In 1979, employment trust funds accounted for $297 billion of the Federal government's entire revenue of $460 billion.[11] In the years 1975–1978, these trust funds made up 63 percent of all of IRS' gross receipts.[12]

IRS has a number of different programs and procedures to enhance trust fund compliance and protect this essential revenue source.

Briefly, these include a computer generated alert program which identifies and prevents pyramiding delinquencies. Additionally, IRS has the authority to require monthly rather than quarterly filing reports, and to set up special trust fund accounts where deposits must be made within two business days after taxes are withheld, all subject to misdemeanor and/or fine for violation.[13] Various penalties and interest assessments are also available.[14] Finally, IRS has the authority to enter into installment pay agreements with delinquent taxpayers.[15]

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[8] Staff interview on July 8, 1980, with Mr. J. R. Starkey, Director of Collection, Internal Revenue Service.

[9] U.S. General Accounting Office, "IRS Seizure of Taxpayer Property: Effective, But Not Uniformly Applied," GGD–78–42, July 31, 1978, p. 6.

[10] 26 U.S.C. §§ 3102(a) 3402(a), and 3403.

[11] Internal Revenue Service, Annual Report (1979).

[12] U.S. General Accounting Office, "IRS Can Improve Its Programs to Collect Taxes Withheld by Employers," GGD–73–14, Feb. 21, 1978, p. 1.

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The Honorable Carl Levin
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

Enclosed are responses to each of the principal findings and recommendations contained in your Subcommittee's October 8, 1980 report on the Internal Revenue Service's collection practices and their impact on small business. We appreciate being afforded the additional time needed to submit our responses.

The Internal Revenue Service has an obligation to seek to ensure the timelv and complete payment of delinquent taxes owed the United States. These efforts are essential to protect the revenue and to achieve equity among taxpayers. Taxes that are not paid ultimately become a burden to all compliant taxpayers.

The Service recognizes that its substantial powers must be exercised with care and only where the facts and circumstances of particular case justify their use. Service policies and procedures instruct our personnel that this mission is to be achieved, where possible, without placing undue hardship on taxpayers. In the case of business taxpayers, our personnel are required to consider all available alternatives before seizing a going business.

The Internal Revenue Service is concerned that its collection personnel not use tools such as lien, levy and seizure when the facts of a particular case do not justify resort to such measures. By the same token, the Service must also be concerned when such actions are not taken in cases where appropriate. The judgments to be made are often difficult. Errors of both types will no doubt occur, but these can be minimized through appropriate management action, including case reviews.

Let me assure you of our continuing commitment to ensure that management direction in this area conforms to the policies and procedures of the Service.

With kind regards,

Sincerely,

(Signed) Joseph T. [illegible]

Acting Commissioner

Enclosures

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Subcommittee Finding:

(A)(1) Liens are imposed against property with value grossly in excess of the amount of the tax delinquency. Additionally, liens frequently remain on taxpayer property even after the delinquency is satisfied and the lien is no longer necessary to protect the government's interest.

Subcommittee Recommendations:

(1) Liens:

(a) 26 U.S.C. 6325(b)(1) be amended to require that IRS make an assessment of the fair market value of liened property and that IRS retain a lien on a part of the property equal in value to no more than double the amount of the tax delinquency.

(b) 26 U.S.C. 6325(b)(2) be amended to require that IRS assess the fair market value of levied property and promptly discharge the lien as to any part of the property where the taxpayer pays an amount equal to the value of the government's interest in the liened property, or where it is determined that the government's interest in the property has no value.

(c) 26 U.S.C. 6325(a) be amended to set a specific time limit by which a lien release must be effected following satisfaction of the debt secured by the lien.

IRS Response:

Under present law and implementing regulations, the Service is given the discretion to discharge property subject to a lien where there is a finding that the property remaining subject to the lien has a value at least double the amount of the unsatisfied liability (section 6325(b)(1)) or where the taxpayer pays an amount equal to the value of the government's interest in the liened property, or where it is determined that the government's interest has no value (section 6325(b)(2)). The effect of the Subcommittee's recommendations would be to make such discharges mandatory rather than discretionary.

Section 6321 presently provides the Government with a lien against all the property or rights to property of the taxpayer only to the extent of the amount owed by the taxpayer, including any interest, additional amount, addition to tax or assessable penalty, together with any costs that may accrue in addition

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thereto. Commercial creditors are typically afforded similar rights with respect to property securing their indebtedness. For example, a construction contractor who repairs the roof on a house is generally entitled to place a mechanic's lien on the entire house, or on all of the debtor's interest in the house, even though the house (or the debtor's interest in the house) may be many times the amount of the indebtedness.

We do not concur with the Subcommittee's recommendation that the lien in favor of the United States automatically apply only to that part of the taxpayer's property that is equal in value to no more than double the amount of the tax delinquency. Our opposition to this recommendation is based upon the following considerations:

1. Such a provision would place the United States in an inferior position vis-a-vis commercial creditors, thereby increasing the risk that amounts owing would become uncollected. At present, we have the discretion to determine when those risks are not present.

2. The recommendation is unclear as to whether the value in question is determined with reference to the fair market value of the property or with reference to the anticipated net sales value of the property, taking into account prior encumbrances and the anticipated expenses of sale. The former would not adequately protect the Government's interest, while the latter would be difficult and burdensome to determine. Whatever standard was chosen, however, such a provision would require the Government to take into account constant changes that would occur both in the amount of the indebtedness owing and in the value of the property.

3. Such a provision would impose a substantial administrative burden on the Internal Revenue Service. Currently, the minimum bid procedures require the Service to make a similar analysis in connection with assets seized prior to their sale. However, under the minimum bid procedure, this analysis is required only once. Similarly, Service personnel perform such an analysis if the taxpayer files an application for discharge of the lien. For the reasons stated above, however, an automatic requirement applied in the case of all liens would require continuous reexamination. Moreover, the procedure would apply in a far greater

number of cases since liens are more frequent than seizures (445,285 compared to 9,421 in fiscal year 1980). Accordingly, such a provision would substantially impede the Service's ability to collect delinquent taxes under existing funding levels for collection programs.

4. Liens are presently issued by Service collection personnel in both the field and in our Collection Office function ("COf"). Our COf personnel currently dispose of approximately 52 percent of delinquent accounts. Employees in the COf are generally lower graded than Collection field personnel and are not trained to perform the types of analysis required by the proposal. Moreover, the COf does not have access to the facts pertaining to the taxpayer's property necessary for such an analysis. Accordingly, the proposal would make it impossible for the Service to continue to fully utilize the COf in collecting delinquent accounts and would make it more costly to collect amounts owing, a cost that would be borne directly or indirectly by all taxpayers.

For the same reasons, the Service does not support the Subcommittee's recommendation requiring partial discharges of liens when a portion of the liability owing is paid or the government's interest is determined to be of no value. The law now provides the taxpayer with the right to redeem personal property following levy and before sale by paying the delinquency in full. The law provides the taxpayer with the same redemption right with respect to real property both prior to sale and for 120 days following sale. Additionally, sections 6325(b)(3) and 6325(d) provide for subordinating the lien to secure financing to satisfy the lien or transferring the lien to the proceeds of a sale of all or part of the property.

With respect to the Subcommittee's recommendation that liens be released within a specified time following satisfaction of the debt secured by the lien, we agree that liens should be promptly discharged following full satisfaction of the taxpayer's indebtedness but do not believe that the Subcommittee's legislative recommendation would have its desired effect. As we understand the Subcommittee's intent, the concern is that clouds on title be removed as soon as practicable following satisfaction of the indebtedness. Such a provision would not have that effect absent an actual discharge of record by the Service since another creditor would not wish to assume risks in connection with the determination of whether the indebtedness to the United States had in fact been fully paid. Existing Service procedures require our personnel to release a notice of lien immediately upon satisfaction of liability with payments by cash, certified or cashier's check or by money order. There is a 60-day wait in the case of payments by personal check unless the taxpayer presents evidence that the check has cleared; if such evidence is presented, the lien is to be immediately discharged. We do not believe that the suggested change in the statute would add materially to our existing procedures.

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Subcommittee Finding:

(A)(2) Levies are issued precipitiously (sic) against taxpayer bank accounts and receivables even where Revenue Officers and the taxpayer have agreed to an installment pay plan to satisfy the tax delinquency.

Subcommittee Recommendations:

(2) Levy:

(a) 26 U.S.C. 6331 be amended to require that current notice provisions in Section 6335 applicable to seizures be extended to levy actions as well. Specifically, the amendment should require that as soon as practicable after levy of taxpayer property, notice in writing shall be given to the taxpayer, or be left at his home or business. Specifics of the content of the notice should be similar to those mandated for seizures in Section 6335.

(b) Internal Revenue Manual Policy Statement P-5-34 should be revised to read in part: "The facts and circumstances of the particular case must be thoroughly considered before a decision is reached to *levy against a going business* or seize a going business and offer it for sale under levy proceedings." (revision in italics)

IRS Response:

While there may be instances in which notices of levy are precipitously issued by IRS Collection personnel, we do not believe that the record of the Service as a whole would support the Subcommittee's finding. A delinquent taxpayer receives as many as three computer generated notices, including a "Final Notice" warning that collection action may be taken, over a period of several months before the account is declared delinquent and forwarded to District Office Collection personnel. Thereafter, Collection personnel have the authority to enter into installment pay plans with business taxpayers with managerial approval. Moreover, we have recently revised IRM 5235 to require that in the event a manager fails to approve an installment pay plan notice of this action and an explanation must be sent the taxpayer and further collection action cannot be taken without affording the taxpayer an opportunity to discuss the situation with Service officials. (A copy of this section of the Manual is attached.)

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With regard to the Subcommittee's recommendation that Section 6335 be amended to require written notice to the taxpayer in the case of notices of levy as well as seizures, the Service does not believe that such a change is either necessary or appropriate. Existing Service procedures require that all taxpayers subject to a notice of levy receive a copy of the levy by mail (IRM 5324.1(6)(c)). In contrast, in part because of the requirements of Section 6335, Service procedures require that Collection personnel attempt to personally deliver notices of seizure to the taxpayer at the taxpayer's home or place of business. Failing that, such notices are sent by registered mail. Although not technically required by the statute, such efforts are undertaken to permit the Service to readily prove that the requirements of Section 6335 have been met. To apply similar procedures to the far more frequent use of notices of levy would substantially increase the cost of issuing such notices by, _inter alia_, making it impossible for the Service to fully utilize its Collection Office function (COf) personnel. In summary, taxpayers would receive no additional material protections, and the cost of collecting delinquent accounts would increase substantially.

With respect to the Subcommittee's recommendation regarding amendments to Policy Statement P-5-34, we understand the recommendation to extend to notices of levy as well as levies. A notice of levy is served on third parties and usually attaches to assets such as bank accounts and receivables. In contrast, a notice of seizure is served on the taxpayer and applies to real and personal property in the taxpayer's possession or control. Notices of levy may be issued by both our field and COf personnel. In contrast, notices of seizure can only be issued by our field personnel.

The present policy statement applies only to notices of seizure. Our field personnel are in a position to contact businesses and to gain access to the facts necessary to undertake the analysis required by P-5-34. In contrast, our COf personnel have neither the training nor the means to assess facts necessary for such an analysis. Consequently, if the Service were to amend the Policy Statement as the Subcommittee has suggested, COf personnel would no longer be able to issue notices of levy. Under existing and anticipated resource constraints, this would not be in the interests of sound tax administration. We will, however, issue instructions to the field indicating that the existing Policy Statement does apply in the case of the seizure of the principal tangible assets in the possession of the taxpayer that are used in the active conduct of the business, as well as to the business itself.

5235 *(10-16-80)* Managerial Review

(1) Installment agreements must be reviewed by the immediate manager when:

(a) the unpaid liability exceeds $5,000, or

(b) the agreement extends for more than one year; or

(c) an in-business trust fund taxpayer is involved.

(2) The reviewing manager will consider the following factors in reviewing the case:

(a) whether an installment agreement for the amount specified is appropriate (i.e., neither too high nor too low based on the financial information in the file);

(b) whether a future re-evaluation is needed;

(c) whether notice(s) of lien has been filed or should be filed to adequately protect the interest of the Government; and

(d) whether all TDA, Notice, "53" and "23" (tolerance status) modules within the BMF and/or IMF are included in the IDRS installment agreement, based on information available in the case file.

(3) If the installment agreement is disapproved by the reviewing official, the following actions will be taken:

(a) the file will be returned to the originator to make telephone contact with the taxpayer. If unsuccessful, a Quick Note should be mailed. Notification to the taxpayer must take place within 21 calendar days from the date of the agreement;

(b) the taxpayer should be informed regarding the reason for disapproval and be requested to furnish additional information, adjust the installment amount, full pay the account, etc., as appropriate;

(c) on telephone contacts and in correspondence cases where taxpayers request time to assemble the requested information, to attempt to borrow, etc., taxpayers will be requested to respond within ten days; otherwise, enforced collection action may be taken; and

(d) no collection action or change to the agreement will be made without first giving the taxpayer an opportunity to discuss the situation.

(4) Management will conduct a monthly sample review of the Installment Agreement Accounts List to ensure that it is processed in accordance with IRM procedures (see IRM 5239.2).

5236 *(4-14-78)* Disposition of Installment Agreements

5236.1 *(10-16-80)* Disposition of Agreement Documents

(1) The taxpayer should be furnished a copy of the completed Form 433-D, 433-M or 2159.

(2) Installment agreements with the associated TDA and/or notice, and case file, after review by the group manager or Collection Office function manager, will be routed to the TAR function for coding and editing prior to input to IDRS, by CSB. Before routing, the file should be arranged for easy reference in the following order: Form 433-D, 433-M, or 2159 on top, then Form 433-AB, TDA and/or notice, Part 7 of Form 668, Notice of Federal [illegible] Lien, history sheets and any other documents. Annotate Part 7 with the Agreement Locator Number, if it is available at the time the Notice of Lien is initiated. Subsequently available Part 7's should be associated with the agreement in the file.

(3) The Collection Office function should prepare the agreement for terminal input by completing Form 4955, Terminal Input for Payment Agreements, or by adequately coding and editing the agreement itself. This review should insure that all necessary forms and information are attached, and that all lien fees are assessed and Command Code LIENS is input. The name line, and city and state of the levy source will be perfected prior to input of the installment agreement. The street address, if furnished by the taxpayer, will be input but no effort will be made to perfect this information prior to input. It is systemically required that a five-digit ZIP Code be input with each levy source. Where this information is not provided by the taxpayer, input the first three digits of the taxpayer's ZIP Code and "00" for the last two digits. All tax modules to be monitored by IDRS (status 60) and those to be cross-referenced (status 63) should be properly identified. If the taxpayer's current address is different than on IDRS, the address should be updated on IDRS so that the Payment Reminder Notices go to the appropriate address.

(4) Any agreements that do not meet all the major data criteria for IDRS input (e.g., incorrect "agreed balance") should be returned to the responsibility unit. Minor data discrepancies

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Subcommittee Finding:

(A)(3) Seizures have increased dramatically recently, and are being effected without adequate consideration of all available collection alternatives. IRS continues to seize taxpayer property that has no net saleable value (so-called "no-equity" seizures).

Subcommittee Recommendations:

(3) Seizure:

(a) IRS should immediately issue a reaffirmation and clarification to all regional, district and field offices emphasizing that no-equity seizures are prohibited in all cases, and not only in situations where a writ of entry or judicial approval is required.

(b) IRS should immediately issue a memorandum reiterating formal national policy toward seizures of on-going businesses. While an August 15 IRS memorandum addressed this concern briefly, the Subcommittee believes that it is important to give separate emphasis to this issue. The memorandum should emphasize Internal Revenue Manual Policy Statement P-5-34, which provides that seizures of a going business be made only after thorough consideration of all the facts and circumstances, and then only after every reasonable effort has been made to collect the tax on a voluntary basis.

IRS Response:

The Service will issue instructions to its field offices to ensure that all IRS Collection personnel are aware that the Service's procedures on "no equity" seizures apply in all cases and not simply where a writ of entry or other judicial approval is required. We believe that the Service's position is presently understood by our Collection personnel but want to ensure that this is so.

The Service does intend to issue instructions on the application of P-5-34 in the case of the principal tangible assets in possession of the taxpayer used in the active conduct of a business. Although we believe that our personnel should consider all available alternatives to seizure of a going business or the taxpayer's principal tangible assets used in the business, we do not intend to require our personnel to exhaust all other administrative actions before resorting to seizure. In its 1978 report entitled, "IRS Seizure of Taxpayer Property: Effective But Not Uniformly Applied," GAO found that IRS personnel did not make seizures soon enough in some cases where seizure action was warranted. Accordingly, we must ensure that the guidance given our field personnel is balanced. We believe this is achieved by the current Policy Statement.

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Subcommittee Recommendation:

(A)(4) Installment Pay Plans: Internal Revenue Manual should be revised to require that installment pay plans be used for business taxpayers with no prior history of delinquent trust fund accounts, in the absence of unusual circumstances. Business taxpayers placed on installment pay plans should also be required to pay into Special Trust Fund accounts for the duration of the plan to ensure that no further delinquencies are incurred.

IRS Response:

The Service has been reluctant to automatically grant installment pay plans to delinquent business taxpayers. In all cases, the Service has an obligation to take actions necessary to protect the revenues and to ensure the timely payment of tax delinquencies. This is particularly true in the case of delinquent business taxpayers, where the failure of the Service to do so provides the delinquent taxpayer a competitive advantage over another business that complies. Particularly in the case of trust fund taxes where the amounts in question do not belong to the taxpayer and where the potential exists for a "pyramiding" of liabilities, the Service has an obligation to ensure timely and complete payment. In effect, business taxpayers delinquent in the payment of trust fund taxes have misappropriated funds held in trust for their employees. Special trust fund accounts, while appropriately applied in some circumstances, should not be thought of as the only appropriate enforcement tool for the Service to apply in the case of delinquent trust fund taxes, any more than our general criminal enforcement effort should be stressed to the exclusion of civil examination and collection efforts.

An additional problem is that we do not presently have an indicator on our computer master file that would enable us to determine which business taxpayers were first time delinquents. Although such a programming change has been requested, scarce data services resources have delayed this and many other requests from Service functions. When it is possible to identify such accounts, we will again consider the Subcommittee's recommendation.

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Subcommittee Recommendation:

(A)(5) SBA Interagency Agreement: IRS should report to the Subcommittee within 30 days the specific steps already taken and those planned to ensure that the intent of its 1974 Interagency Agreement with the Small Business Administration regarding small business delinquencies is being met.

IRS Response:

IRM 5160 and 5259 require, in part, the following:

- The Chief, Collection (or other appropriate Collection official) establish a working relationship with his/her counterpart in SBA.
- Prior to any enforcement action on SBA funded taxpayers, the revenue officer must notify the established SBA liaison.
- Collection will normally not take any enforcement action for 30 days after notifying SBA. This will generally allow sufficient time for SBA review. If an agreement cannot be reached, SBA can appeal to the National Office. In such cases, additional time is granted before enforcement action is taken.
- IRS participates in SBA sponsored training seminars to make small business taxpayers aware of their obligations.

We will issue a memorandum to all regions emphasizing adherence to IRM 5160 and 5259 and advising them to include this as a review item in their Regional Office Evaluation Program. We will also include this as an item in our National Office Review Program.

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Subcommittee Finding:

(B) The Subcommittee finds that IRS uses closed-case and seizure and levy statistics as a principal measure of collection effectiveness, although there has been no showing of any correlation between the number of closed-cases or seizures and the amount of taxes actually recovered.

Subcommittee Recommendations:

(B)(1) IRS national office discontinue disseminating statistics on enforcement activity and closed-care (sic) inventories pending the results of IRS' proposed study to research the disparity of those statistics and the correlation, if any, between those statistics, the use of various enforcement tools, and the actual debt recovered.

(B)(2) IRS immediately institute a mechanism for regularly collecting, tabulating, and disseminating percentage and amount of debt recovered by district and region.

(B)(3) IRS expand its proposed study to consider data on cost effectiveness (costs expended compared to debt recovered) of levy, seizures and sales, installment pay plans, and specifically consider the following:

(a) for seizures and sales -- number of seizures, number of sales, gross proceeds from sales, funds applied to tax liabilities, personnel and other overhead costs, number of releases, reasons for releases.

(b) for business installment agreements -- number of agreements, default rate, proceeds, administrative costs.

(B)(4) IRS report regularly to the Subcommittee on the study's progress and that copies of all findings, conclusions and recommendations be reported to the Subcommittee for review and comment prior to the issuance of IRS' final report, now scheduled for January, 1981.

IRS Response:

Closed case statistics and statistics indicating the number of cases in active inventory are used as measures of collection effectiveness. Projected and actual case closures are also an integral part of the budget and planning processes.

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Seizure, levy and lien statistics, on the other hand, are not used to measure program effectiveness. Rather, they are among a number of indicators used by managers to determine activity trends. In this respect, raw statistics alone should not be used to determine whether appropriate case management techniques are being used, but only as an indication of areas where further analysis and management review may be in order. Both a low and a high incidence of use of particular enforcement tools may indicate a need for further analysis and case review. For example, the high number of seizures in our Greensboro District caused a review to be initiated by the Southeast Regional staff.

With respect to the Subcommittee's recommendation that we discontinue distributing statistics on enforcement activities and closed case inventories, we plan to continue to distribute closed case statistics to our District management officials, but will distribute statistics on the number and rate of seizures, liens and levies only to regional offices with the instructions that these are to be used solely for analysis purposes and are not to be made available to our districts.

With respect to the Subcommittee's recommendation that the Service institute a mechanism for regularly collecting, tabulating and disseminating the percentage and amount of debt recovered by districts and regions, we are in general agreement with the Subcommittee's recommendation that the Service collect, tabulate and disseminate additional information and statistics that would provide measures of the effectiveness of our collection efforts, including data such as that identified in the Subcommittee's recommendation. We will consider what specific additional information would be useful for this purpose and determine the nature and extent of the data services commitment necessary to produce such data.

As the Subcommittee requested, we have revised our study to consider the information concerning seizures, sales and business installment agreements to the extent that information is available or can be readily produced. A computer operational change in mid-January 1981 will allow us to modify our current reporting system to obtain installment agreement proceeds. However, certain statistics cannot be produced in the study because the basic data has not been gathered. For example, the present Collection Division management information system does not contain data on case time reporting. In the absence of such data, we are unable to tabulate the cost data requested by the Subcommittee.

The study is now being conducted by our Internal Audit Division and is scheduled for completion on March 31, 1981. When the final report is finished, we will provide copies to the Subcommittee for review and comment.

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Subcommittee Finding:

(C) The Subcommittee finds that IRS' group managers abuse their supervisory review authority and require Revenue Officers to take harsh unnecessary enforcement actions contrary to the professional judgment and individual discretion vested in Revenue Officers.

Subcommittee Recommendation:

(C) To address the Subcommittee's findings regarding managerial abuse of supervisory review authority, we recommend that IRS immediately issue a policy clarification that group manager review of Revenue Officer seizure recommendations be limited to review and approval of proposed seizures only, and that group managers are prohibited from mandating seizures.

IRS Response:

Group managers are promoted into their positions from the ranks of revenue officers. They are knowledgeable in tax law, IRS policy and procedures, financial analysis and collection techniques. Selection is based on their ability to exercise sound judgment in handling cases and their managerial ability and potential.

The Service requires group managers to review a revenue officer's cases periodically to determine if employees are complying with Service policies and Internal Revenue Manual (IRM) procedures. This review helps ensure an equitable and uniform approach to taxpayers. While the employee may view the manager's approach as infringing on his/her judgment and/or discretion, it is needed to ensure that the employee is conforming with existing policies and procedures.

Through the Subcommittee's hearing, we became aware of a number of instances in which the nature of the manager's review was improper. For example, it is clearly contrary to the policies of the Service to seize without regard to the facts and circumstances of a particular case or to take actions that defeat rather than promote timely payment of amounts owing the government. It is the Service's intention that managerial reviews be predicated on sound case analysis and application of Service policies and procedures to that case. Our managers should be concerned that stringent collection sanctions not be applied when it is not appropriate to do so; but they should also be concerned that such sanctions be applied when the facts of the case warrant. Accordingly, while we share the Subcommittee's concern that seizures and other collection actions be taken only in those case where the facts of the case support such actions, the Service believes that managers must retain their ability to both prevent and direct such actions on the basis of sound case analysis.

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Subcommittee Finding:

(D) The Subcommittee finds that IRS violates its own policy by using closed-case and enforcement statistics to impose production pressures and quotas on its own employees.

Subcommittee Recommendation:

(D) To address the Subcommittee's finding regarding IRS misuse of closed-case and enforcement statistics to impose production pressures and quotas on its employees, we recommend that IRS submit to the Subcommittee copies of the requested regional plans for implementation of its August 15, 1980 memorandum regarding the use of statistics.

IRS Response:

Since 1960, the Internal Revenue Service has consistently opposed using closed-case and enforcement statistics to impose production pressures and quotas. We emphasize this through National and Regional reviews and have given this policy position even greater emphasis with the advent of such Civil Service initiatives as Merit Pay and the Senior Executive Service. Copies of the Regional plans/responses to the Deputy Commissioner's August 15, 1980 memorandum are attached, together with two other memoranda issued by the Deputy Commissioner on July 29, 1980 ("Use of Statistics") and September 24, 1980 ("Use of Enforcement Statistics"). Adherence to these memoranda and implementation of Regional plans will be monitored through the National Office Review Program (NORP).

Mr. EGGER. We do not have a Small Business Advisory Group as such. There was one—this is my recollection—a number of years ago, and for whatever reasons. It was dropped long before this administration.

I do have a Commissioner's Advisory Group which is made up of 16 members, and they are selected from a long list of nominees who are sent to me by various practitioner organizations, various business groups, and again, Members of Congress. Other people send nominees, and from those nominees I make the selection on the basis that I attempt to cover all gradations of business groups, both small and large, and I attempt to cover somewhat geographically so that we can get input from various parts of the country. I also attempt to cover the other variances, such as I don't want to see all lawyers, or all accountants, or all economists, or all college professors, or any of those things. So we attempt to have a variety.

It does include always a member of the National Society of Public Accountants, which as I said earlier in my testimony by and large include among their clientele small business. In the next selection, which will come at the end of this month or early next month, I hope I will receive and I will solicit nominees from the various representatives, such as NFIB and SBA nominees for that advisory group.

I have invited the National Society of Public Accountants to arrange a meeting at the national level with me so that I can hear directly from them at least once a year on the kind of problems they're running into on behalf of their clients. So we are doing everything that we can, I think, responsibly to create avenues for small business to alert us to the kind of problems they have in compliance and so on.

Mr. **Lynch**. I have one final question, Mr. Chairman.

We understand that the small business community last month proposed five safe harbors from the debt-equity regulations. Just for the record, if you could let us know if the IRS received those proposals and what their status is, since we talked about that regulation a great deal here.

Thank you, Mr. Chairman.

[The information requested above follows:]

Status of Debt-Equity Regulations

The Internal Revenue Service and Treasury Department did receive the five safe harbor proposals that the small business community recommended be made part of the debt-equity regulations. The proposals are being given serious consideration both at the IRS and at Treasury. A final draft of the regulations is now being prepared. We anticipate that final regulations will be issued within the next several months.

Mr. **Ireland**. Thank you, Mr. Commissioner, for your indulgence in waiting and for your time. We appreciate it very much. Again, I like the direction we're all moving in.

Mr. **Egger**. Thank you, Mr. Chairman.

Mr. **Ireland**. Our final witness is Kathleen Buck, Associate General Counsel for the Department of Defense. Thank you for hanging in here all this time.

Ms. **Buck**. My pleasure.

Mr. **Ireland**. We appreciate your indulgence. You may fire when ready.

TESTIMONY OF KATHLEEN A. BUCK, ASSISTANT GENERAL COUNSEL/LEGAL COUNSEL, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Ms. **Buck**. Mr. Chairman, we appreciate the opportunity to appear before you today, to provide you with the views of the Department of Defense on matters concerning the Regulatory Flexibility Act, and the mission of the Department of Defense.

With your permission, what I would like to do is just submit my testimony for the record and then cover those points that I think are most important here. I would also like to add that our position does reflect the views of the administration. Then, in addition, with your permission, I would like to address the examples that were raised in the testimony by the Small Business Administration this morning pertaining to DOD.

Mr. **Ireland**. Without objection, we will do it that way.

Ms. **Buck**. Thank you.

I think it is important to note that fundamentally the Department of Defense and the military services ardently support measures designed to relieve small business of unnecessary and burdensome regulation. In our view, resources vital to the continued effective maintenance of the national defense are significantly comprised of small business concerns. For our part, we endeavor to be innovative and sensitive to those small business needs that are communicated or detected by us.

The Department of Defense and the armed services generally are not required by statute to publish rules for comment prior to adoption as a final rule. Our regulations ordinarily fall within the military affairs function, or the agency management, or public contract exemptions from the notice and comment requirements usually imposed on rulemaking by the Administrative Procedure Act. The APA exemption is based on a longstanding recognition by the Congress that the functional needs of the Department in fulfilling the national defense mission would be thwarted by the imposition of statutorily required rulemaking procedures.

Cumbersome rulemaking requirements which are central to the development of agency rules that are responsive to public needs are inappropriate. In the military context, it is at least conceivable that the delay attendant to the notice-and-comment cycle could in some circumstances diminish the military commander's ability to effectuate prompt rules governing the command. The potential adverse effect this may have on the command under critical conditions is not always easily calculable. Notwithstanding the exemption, the Department and the services publish some rules for public comment on a voluntary basis when proposed rules would have a substantial impact on the public.

Moreover, under this voluntary publication for public comment program, careful attention is given to the needs and viewpoints of small business concerns and local government entities. Significantly, I want to point out here that policy initiatives within the Department, without statutory prompting, have sought to increase the competitiveness of small business and the percentage of contracts awarded to small business concerns in the area of high technology research and development in particular.

Further, under DOD regulations governing defense contract financing policy, as a matter of policy, the Department of Defense has sought to encourage active small business participation in enhancing small business' share of defense contract awards. We encourage—and I would like to emphasize this—small business associations and representatives of small businesses to contact us directly and immediately if they encounter problems in any area of defense programs.

As a general rule, the Department of Defense is vested with neither the authority nor the responsibility for discharging a regulatory role in the Federal scheme. Whether extensive analytical requirements to ascertain anticipated consequences for small businesses should be adopted for Department of Defense rules is being considered presently in the process of formulating the proposed legislation for a uniform Federal acquisition system proposal developed by the Office of Federal Procurement Policy.

This forum is utilizing both agency and public comment to address this concern. In this manner, the commercial interests of small businesses are being fully evaluated in the overall context of revising the acquisition process while at the same time avoiding an imprudent burden on rulemaking essential to the Department of Defense. Without exception, the Department of Defense consistently views congressional initiatives in regulatory reform legislation to be laudable and desirable, especially with regard to affording small business relief from unnecessary regulation. Moreover, we appreciate your understanding of the pitfalls that could be created by an indiscriminate application of regulatory analysis requirements on the defense mission. The opportunity to present the views of the Department is greatly appreciated. We would urge you to continue to review regulatory relief legislation with due regard for the possible adverse effects it could have on the Department and the armed services.

I would also like to now talk for a minute about the examples that were raised by the Small Business Administration pertaining to the Department of Defense only. The first one that they talked about was the so-called LOGMARS project. They indicated that this was done in a rather hasty manner. I would like to state that this was not done in a hasty manner. This is something that was under review for at least a couple of years. My recollection is that it was also something done pursuant to a GAO report which recommended that we go in this direction.

In addition, the SBA representative stated that a small business might be required to purchase the machinery necessary to print up these labels, at a cost of between $12,000 to $25,000. That simply is not the case. We have a list of companies who are willing and prepared to sell such labels to any small business who is involved in a defense contract that would require this sort of labeling.

The second issue that was raised was the withdrawal from bid posting of small purchase requests for quotation at the Defense Logistics Agency. On this one, I think this was a mistake. This was something that our small business office, which I think is really on the ball, picked up on. This problem was halted. It has been solved.

On the third one, the replenishment parts breakout program, if they are talking about the same program that I am familiar with I am somewhat mystified. This is a program that was specifically developed to help small businesses. In fact, although they indicate in their testimony that if small businesses had been given an opportunity to comment there might be less restrictive alternatives to the coding system, my understanding is that this is not a final decision. In fact, what we have done is used the Small Business Administration's list of small business organizations, and we have gone to them specifically for comment. Further, in response to requests by House and Senate staffers, we have extended the comment period for an additional 60 days. So I guess I'm at somewhat of a loss to understand why this example was used.

[The letter referred to above follows:]

Office of the Under Secretary of Defense,
Washington, D.C., September 3, 1982.

By letter of 2 July 1982 we solicited your comments on a proposed supplement to the Defense Acquisition Regulation. The supplement will be entitled, "DOD Replenishment Parts Breakout Program." We requested comments within 60 days.

Considerable interest has been expressed in this program. In order to provide additional time to review this proposal by interested parties, we are extending the comment period another 60 days.

Please provide eight copies of your comments by 4 November 1982. Your interest in this supplement is appreciated.

William A. Long,
Deputy Under Secretary, Acquisition Management.

Mr. Ireland. You say you don't know whether you're talking about the same thing?

Ms. **Buck**. I think we are talking about the same thing. I just had a discussion on this issue with someone from our small business office.

Mr. **Ireland**. I think we could better communicate.

Ms. **Buck**. I think it is unfortunate here, in part, that both the Small Business Administration witness and I both weren't talking. I think it would be a good idea for us to get together on this. In the 14 months that I have been with the Department I have never received a communication from the Small Business Administration on this matter.

Mr. **Ireland**. I would say there is something wrong, then, over in the Pentagon because I know the Small Business Administration has been knocking on that door day in and day out for lo these many years.

Ms. **Buck**. There was a limited exchange of correspondence back in the spring of last year, but they have not contacted us since. We are certainly willing to sit down and talk with them about these problems.

Mr. **Ireland**. I have a hard time in the overall Defense Department's attitude reflected in your testimony, and this is not a personal animosity. I am for a strong defense. The thing that disturbs me throughout this area in dealing with the private sector is that the Defense Department thinks that they can do no wrong, and they are exempt from this, that, and every other thing, an area unrelated to what we're doing today, that is significant along that line, is the whole area of contracting out and the absurd idea that we should have a moratorium on contracting out when we ought to be enhancing contracting out.

It all goes back to this idea that they run around in the Defense Department and hide behind the logo "We are the military; therefore, if we don't get to do it our way, we will be injuring the defense capability of this country." It almost is so absurd that it is laughable, even to somebody that is so dedicated to the strength of this country, as I am. We all know that an awful lot of what the Department of Defense does is running laundries, or doing a million other things that have nothing to do with whether we are able to win on the battlefield.

In that regard, I would like to go through a series of questions here that indicate my frustrations along that line, and indicate some of the contradictions that come out of the things that are coming out of your department.

Do you have a legal opinion that you can provide to us which proves all Department of Defense functions are military? Do you have a legal opinion that everything you do is military?

Ms. **Buck**. I'm not sure that we have actually ever taken——

Mr. **Ireland**. That's what you say in your testimony.

Ms. **Buck**. The position that everything we do is military? We do have legal opinions on this general subject area.

Mr. **Ireland**. Well, you're telling me that you are not covered by Reg Flex because you are military. What I would like to have for the record is either an opinion from you that everything you do is military, and therefore not covered, in the form of a legal opinion or, if it is not all military, just which things are and which things aren't.

It seems to me, based on the thrust of the kind of information we get from the DOD, that you must have it right on the shelf somewhere, because there is this great, almost arrogance in saying "Don't touch us, we know what we're doing." It is like the very fact that the Congress of the United States would even ask a question is appalling. So we have got to have that and have it on the record. I am sure it would be easy to do.

Ms. **Buck**. We would be happy to do that.

Mr. **Ireland**. There are two parts to the question: No. 1, is everything you do military and, therefore, not covered? Second, if the answer to that is no, then which programs are and which ones aren't?

Ms. **Buck**. Also, we certainly are happy to come up here and present our views on this subject. We are always willing to accept suggestions on how we can operate better.

[The following information was received from the Department of Defense for insertion in the record at this point:]

Department of Defense,
Office of General Counsel,
Washington, D.C., Oct. 22, 1982.

Hon. Andy Ireland,
Chairman, Subcommittee on Export Opportunities and Special Small Business Problems, House of Representatives, Washington, D.C.

Dear Mr. Ireland: Pursuant to section 553, title 5, United States Code, the Administrative Procedure Act (APA) exempts from its rulemaking requirements all rules concerning a "military or foreign affairs function," and all matters relating to public contracts or agency management. As you noted in the hearing, the exemptions were drawn on the basis of functions. Despite the broad language of the exemptions, the Department has a long-standing program for policy reasons which provides for voluntary publication for public comment of rules that are determined to have a substantial impact on the public. The Department has voluntarily developed a regulatory reform program although the exemptions contained in Section 1 of Executive Order 12291, paragraphs (2) and (3) apply to the majority of regulatory activities of the Department. Exceptions to these exclusions may be found in the Civil Works regulatory activities conducted by the U.S. Army, Corps of Engineers.

The Regulatory Flexibility Act was established to encourage agencies to tailor regulatory and informational requirements to the size of the business. The Act applies only to those rules defined as follows: "[T]he term 'rule' means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) . . . or any other law." Generally, the Department of Defense does not perform a regulatory function and regulations of the Department fall within the APA exemptions of matters related to agency management, personnel, public property, loans, grants, benefits, or contracts. Thus, the Regulatory Flexibility Act does not apply.

The Defense Acquisitions Regulations System (DARS) is a system of policies and regulations to guide managers in the conduct of DOD acquisition activities. The DARS does not contain governmental regulations involving statutory or regulatory sanctions for noncompliance. Because the DARS focuses on the business management needs within the Department of Defense, it has been the Department's position under the APA that such regulations need not be published in the Federal Register before they become effective. The DARS provide guidance on the acquisition of combat weapons, weapons systems and other materiel peculiarly designed for use by combat forces and their support units—materiel specifically required for the performance of a "military function."

The Army Corps of Engineers civil works and regulatory programs are ordinarily subject to APA procedures. The functions of the Corps are disparate from the traditional military functions of the Department of Defense. While there may be a nexus between Corps functions and national security, readiness and mobilization, the Corps role in civil works is based on their capabilities in handling such projects. In addition, the Corps projects are authorized on a basis distinct from other Defense programs. The authority of the Corps is conferred through title 33, United States Code and is tied to water resources and other matters not necessarily essential to the military affairs functions of the Department. In some cases, the Corps does have military engineering responsibilities. Thus, all rule publication decisions are on a case-by-case basis.

As I indicated in my testimony, the Department has emphasized going to small business organizations directly on such programs as the "Spare Parts Breakout Program." These organizations provide an insight to small business problems that would be difficult to duplicate internally. As indicated in the letter of Mr. Trosch, which is attached, although our regulations do not generally fall within the scope of the Regulatory Flexibility Act, we will continue to accommodate the needs of small business through our small business program.

Sincerely,

KATHLEEN A. BUCK,
Assistant General Counsel (Legal Counsel).

JUNE 30, 1981.

Mr. MARSHALL PARKER,
Acting Chief Counsel for Advocacy, Small Business Administration, Washington, D.C.

DEAR MR. PARKER: This is in reply to your letter requesting that I elaborate on the views of the Department of Defense regarding the Regulatory Flexibility Act. As I stated in my earlier letter, we have concluded that the Department of Defense does not issue any regulations that are subject to the Act.

The Regulatory Flexibility Act established, as a principle governing the issuance of regulations, that agencies will attempt to tailor regulatory and informational requirements to the size of the business or other organization which is subject to regulation. This Act does not, however, apply to all regulations. The Act was designed to minimize the economic impact of rules issued by the regulatory agencies; accordingly, the Act applies only to those rules defined as follows: "[T]he term 'rule' means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title [5], or any other law . . ." Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164 (1980) (to be codified in 5 U.S.C. 601(2)). Section 553 of title 5 exempts military and foreign affairs functions of the United States and exempts matters related to agency management, personnel, public property, loans, grants, benefits, or contracts. The Department of Defense does not perform a regulatory function, and the regulations of the Department of Defense come within these exemptions. There is no other law that requires the Department of Defense to publish a notice of proposed rulemaking. Thus, by its terms, the Regulatory Flexibility Act does not apply.

Our reading of the Act is consistent with the intent of this statute that regulatory agencies should seek to avoid unnecessary economic burdens on the public when adopting regulations to protect the health, safety, and economic welfare of the nation. Unlike rules of general applicability issued by the regulatory agencies, the Department of Defense principally deals with the public through its contracting. Our regulations establish the procedures and the terms and conditions under which the Department of Defense contracts. Contractors are compensated in the contract price for complying with these terms.

Congress has enacted statutes pertaining to our contracting activities that in many respects parallel the Regulatory Flexibility Act. Through the Small Business Act, the Congress made known its favor for small business, and the Department of Defense has implemented an extensive small business program. Under the Small Business Act, moreover, the Office of Federal Procurement Policy (OFPP) is required to conduct analyses of the impact on small business resulting from revised procurement regulations. The policies adopted by OFPP apply to the contracting of the Department of Defense

In summary, our conclusion that the regulations issued by the Department of Defense are not of the type contemplated by the Regulatory Flexibility Act does not mean that we do not recognize the needs of small business. Although our regulations are not subject to the Regulatory Flexibility Act, we will continue to accommodate the needs of small business through our small business program.

Sincerely,

DENNIS H. TROSCH,
Assistant General Counsel (Logistics).

Mr. IRELAND. Well, I hope that's true, that is why we are here. We think you can operate better in this regard. You have to know that if you were sitting up here you would hear agency after agency—you heard the IRS—come up here and talk about all the wonderful things they are doing for small business and patting themselves on the back. You know, with my eyes closed, I could give the "cookie cutter" testimony that we get along that line because everybody wants to talk about all these wonderful things they are doing. Then you get down to the guts of the matter, and the bureaucratic activity and the redtape which is killing small business. There is usually really no need for it. So I guess you have to put up with a little "that's wonderful; everybody's doing it." However, we don't give out gold stars for people doing something that they should be doing in the first place.

Let me ask you again in the same context, what then is your response to the argument that the Department of Defense must comply because of the "any other law" provision in the act? What is your response that you must comply along that line?

Ms. Buck. I am not aware of any other law that would require us to publish our regulations. My recollection is this is something that we have specifically researched.

Mr. Ireland. Then why is the Corps of Engineers complying with the act?

Ms. Buck. The Corps of Engineers is really a unique entity in the Department. We routinely treat them differently because——

Mr. Ireland. The Corps of Engineers has certain military activities; does it not? I mean, it's not all dams and bridges. You know, if we got into a fight somewhere, they would be doing something, wouldn't they?

Ms. Buck. As a matter of fact, all of the regulations that I am familiar with that they have been issuing, during my tenure in the Pentagon, have pertained to their civil works projects. It is further my understanding that they are doing the reg flex analyses. That is in regard to all of their civil works projects, but not any military activities that they are engaging in. We routinely do treat them differently. For example, in the regulatory reform area, or consultation in the intergovernmental area, there are a number of areas that——

Mr. Ireland. This seems to fly in the face of your argument that you don't have to do anything along this line because it is military. I mean, you have a contradiction here.

Ms. Buck. I would have to disagree with you on that. I think that, if anything, it shows a good faith effort on our part to separate off those activities of the corps that truly are civil in nature and——

Mr. Ireland. Then why don't you do that with all the other parts that are truly civil in nature—garbage collection, or something else? Why just do it for the Corps of Engineers?

Ms. Buck. I don't know that we have issued any regulations in regard to——

Mr. Ireland. Let me ask you this: Why don't you put in a written statement to us what the rationale is for the Corps of Engineers complying, even if it's out of the goodness of your heart, and whatever the rationale, why isn't it applied to other areas of what the Department of Defense does? OK?

Ms. Buck. Yes. I think I can answer that at least in part.

Mr. **Ireland**. I would rather have a statement in writing about that. I think it is just that significant.

One further question and then I would ask the staff for questions.

It is my understanding that the Department of Defense supports Senator Laxalt's regulatory reform attempts embodied in S. 1080, which I am sure you are familiar with. If this is so, I become confused since S. 1080 changes your Administrative Procedure Act exemptions. Can you comment on that?

Ms. **Buck**. I am familiar with S. 1080, and my understanding is that the S. 1080 that would be considered by the Senate would retain the military functions exemption in it. We have been dealing with Senator Laxalt's staff on that and the entire Judiciary Committee.

Mr. **Ireland**. But it also says not everything that you do is military.

Ms. **Buck**. The version of S. 1080 that I last saw would have retained that exemption——

Mr. **Ireland**. For the military. But our information is that it removes contracts from that and, therefore, I guess in a broad sense clearly indicates that not all what you do is military. Of course, you have been telling us that all you do is military, but in the goodness of your heart you let the Corps of Engineers out from under the tent. We want to know why you don't let some others out. Again, I think if you address those things that I mentioned——

Ms. **Buck**. Do you want us specifically to address S. 1080 also in the opinion?

Mr. **Ireland**. No, I don't think you need to do that. I would like the other two things that we talked about in writing, because then we'll know where we stand.

Ms. **Buck**. We were very concerned about S. 1080 and, as I said, our understanding is that the current version would retain that exemption exactly as it is.

[The comments of the Department of Defense on S. 1080, referred to above, follow:]

General Counsel of the Department of Defense,
Washington, D.C., December 7, 1982.

Hon. John G. Tower,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: The Department of Defense is concerned with the potential for several provisions of S. 1080, as reported by the Senate Judiciary and Governmental Affairs Committee, to affect adversely the ability of the Department and the military services to discharge the national defense mission effectively. S. 1080, a bill of the 97th Congress, would amend the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1976 & Supp. III 1979) to require regulatory review and analysis of all proposed and final agency rules. Further, it would expand the scope and standard of judicial review of agency action.

The proposed legislation largely incorporates in statutory form the current requirements of Executive Order No. 12291, Federal Regulation (Feb. 17, 1981). A threshold standard of cost-effectiveness would be established by statute as a condition precedent to the adoption of agency rules. An agency would be required to ascertain and consider the relative costs, benefits, and adverse effects of and reasonable alternatives to, any proposed major rule, as defined in the bill. Although mathematical precision in the agency rulemaking evaluations is not mandated, the bill requires the agency to make a "reasonable determination," based upon the rulemaking file considered as a whole, that the costs and adverse effects are justified by the benefits that would accrue under any proposed major rule, and that the cost-effectiveness of the rule exceeds the cost-effectiveness attributes of all proposed alternatives.

The Department of Defense objects to the proposed emasculation of the exemption of "military and foreign affairs" functions from the public notice and comment rulemaking requirements of 5 U.S.C. § 553 contained in the Governmental Affairs version of S. 1080. The scaled-down version proposed by the Governmental Affairs Committee would severely restrict the application of the exemption, limiting it to DoD and military service rules that pertain to a "military or foreign affairs function that is specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy." (S. 1080, § 3, 97th Cong., 1st Sess. (1980) (Cal. No. 274, at 60)).

The utility of the exemption, as amended, would be minimal at best; the great bulk of the rules issued by DoD and the services in fulfillment of their critical defense mission would be unnecessarily inhibited by a statutory rulemaking and regulatory review requirement. The expeditious issuance of rules at all levels of command would suffer as a consequence.

Although the Department intends to integrate the regulatory requirements of the recent Executive Order, which is the immediate predecessor of the subject bill, a statutory imposition of such costly and time-consuming prerequisites to promulgating effective rules will unnecessarily encumber the expeditious issuance of rules vital to the operations of the armed forces and the fulfillment of the national defense mission. The assurance of optimal levels of readiness and performance in the military services requires that the Department retain the option to dispense with impact analysis when, in its sole judgment, the command control, readiness, or mobilization requirements essential to national defense planning and deployment require such action. Absent this flexibility, the military and foreign affairs rulemaking exemption would be effectively emasculated.

Unlike those agencies concerned with regulating the non-defense public sector, the principal Department of Defense mission of national defense and security is not a component of a broader national regulatory plan to administer health, safety, welfare, or economic policies. The deregulation of the non-defense public sector is intended to counteract excessive costs of complying with a plethora of health, safety, environmental, natural resource, and economic regulations issued at the federal level. By contrast, the rules issued at the various component levels of the Department of Defense are only incidental to the conduct of their primary military and defense missions. The rules promulgated by the Secretary of Defense, the defense agencies, the military services, the major commands, and all subordinate components and commands, therefore, are necessary to the defense purpose and internal administration. Any impact on the public occurs merely as a consequence of this purpose.

Moreover, this unwarranted intrusion into the commander's domain would subject DoD regulations that are not intended to regulate the public, and the impact of which is only incidental to the execution of the Department's principal mission of national defense, to an inordinately burdensome review and comment cycle. Significantly increased litigation of the validity of military rules would also be invited.

The Department objects to any further erosion of the rulemaking exemptions other than the military and foreign affairs functions exemption. The Judiciary Committee's limitation of the personnel rules and practices exemption under an exclusivity requirement, constitutes an unworkable restriction that may serve to spawn unnecessary litigation and curtail the practical application of the exemption. The elimination of the agency management exemption and the restrictions imposed on the applicability of the personnel practice and procedure, interpretative rule and statement of policy, and the "impracticable, unnecessary, or contrary to the public interest" exemptions, poses undue inhibitions on an agency's ability to exercise its considered judgment to bypass the rulemaking process in the public interest on matters that do not have a substantial effect on the public. The result would be to constrict an agency's capability for conducting its own affairs and discharging its delegated functions by reducing the flexibility necessary to adapt to changing situations confronting the agency. While public scrutiny and participation in agency action generally is both desirable and necessary for a balanced agency approach to many multifaceted problems, the agency must preserve a degree of self-determination on matters of an internal nature.

Similarly, the Department opposes narrowing the "proprietary exemption" by superimposing Office of Federal Procurement Policy or General Services Administration requirements on DoD rules regarding defense procurement practices and procedures. Since S. 1080, in the Department's view, is an inappropriate legislative vehicle for further defining the authority to prescribe defense procurement policy, the Department objects to this proposed impediment to adopting efficient acquisition, management and disposal practices. Significantly, the Department views the elimination of the "good cause" exemption as imprudent, in view of the variety of matters for which rulemaking would not serve public purposes effectively, but which do not squarely fall within the purview of some other exemption.

The Department further objects to the inclusion of the "Bumpers amendment," or any portion thereof, in S. 1080. The amendment would require substantial support in the record, generally viewed as equivalent to "substantial evidence," for any necessary or asserted factual bases for an agency rule in order to survive judicial scrutiny. Moreover, the amendment would preclude, under the Judiciary Committee version, the judicial use of presumptions on questions of law regarding agency expertise and require a judicial determination independent of agency findings. The Department opposes any amendment which would foreclose judicial deference to agency expertise or subject informal rulemaking to a heightened standard of review beyond arbitrary, capricious, not in accordance with law, or abuse of discretion. Requiring or inviting judicial incursion into the decisions of military commanders, an area in which the courts consistently have been reluctant to become entangled, would constitute an injudicious approach to ensuring agency compliance with the legislative standards delegated by Congress.

The curtailment or elimination of judicial presumptions regarding the regularity, jurisdiction, authority, and expertise of agency action are inimical to the promotion of judicial economy and efficiency. The effect will be to require unnecessary offers of proof with respect to these elements. This would needlessly consume the courts' and the litigants' time, diverting limited agency resources into the already burgeoning activity of administrative litigation. The use of presumptions, furthermore, does not prevent the private litigant from introducing evidence sufficient to negate the presumption, thereby requiring the agency to establish all of the elements justifying its action.

The restrictions the bill imposes on the deference that a court may accord to agency expertise and interpretations of its own rules, and the presumption limitations, present unique problems to the Department of Defense and the armed forces. Unlike other agencies, the Department of Defense rulemaking power, and in particular, the military services, has its genesis in the constitutional powers of the President as Commander-in-Chief of the armed forces, as well as the congressional delegation of legislative functions. Military commanders, moreover, possess the inherent authority to provide for the health, safety, morale, welfare, and security with the command jurisdiction, independent of a legislative delegation by Congress or executive delegation under the Constitution. To the extent Department or military rules are based on a delegation of command authority distinct from Congress' relinquishment of authority, the intrusion of the commanders' prerogatives by judicial review must be kept to a minimum. Precluding the use of judicial presumptions, accordingly, is an unjustifiable interference with the military mission in that it would unnecessarily require the armed forces to substantiate the validity of their rules even in the absence of a credible challenge to the underpinnings of a rule.

Advocacy of judicial noninterference is congruent with the present judicial interpretation of the doctrine of nonreviewable military activities. In reviewing military administrative actions, traditionally the courts have exercised prudent restraint from interceding in matters legitimately in the military sphere. Underlying this restraint, among other things, is a reticence to entangle the courts in disputes involving areas specially vested in the services because of their peculiar expertise. Consequently, under the standards fashioned by the courts military administrative actions are reviewable generally only on cases involving a lack of jurisdiction over the person; constitutional, statutory, or service regulation violations; or an abuse of discretion. The Department, accordingly, disagrees with the subject bill's proposals to apply a statutory standard of "substantial support in the record" to informal rulemaking, as importuning an unwarranted incursion into military activities.

The Department of Defense fully supports the efforts to reduce the costs and burdens of inefficient government regulation of the public sector. Moreover, the Department voluntarily undertakes to provide notice and request public comment on many of its proposed rules, notwithstanding the "military and foreign affairs" rulemaking exemption, and will continue to do so. We urge, however, that careful consideration be given to the national defense mission of DoD in the formulation of the Committee's position on S. 1080, including the following:

Application of the "military and foreign affairs" rulemaking exemption in 5 U.S.C. § 553(a)(1) to rules that are published pursuant to agency regulations and that are not required by statute to be published.

Exemption of rules published pursuant to agency regulation, and not required to be published by statute, from statutory regulatory analysis and review requirements.

Exemption of "military and foreign affairs" functions from any proposed amendments to the bill requiring congressional review or legislative veto of agency rules.

Elimination of any provision that enlarges the scope of judicial review under 5 U.S.C. § 706 to include agency hearings on the record that are not required by statute to be held on the record.

Elimination of any provision that raises the standard of review for informal rulemaking conducted pursuant to 5 U.S.C. § 553 to a standard greater than arbitrary, capricious, or abuse of discretion.

Elimination of hybrid rulemaking procedures, including oral proceedings and cross-examination, as a mandatory part of the rulemaking process.

Retention of the rulemaking exemptions for government procurement, personnel and agency management, interpretive rules and policy statements, and the good cause finding of unnecessary, impracticable, or contrary to the public interest.

Pursuant to the request of the Office of Management and Budget (OMB), the Department has provided its views on S. 1080 to OMB. OMB has advised that, from the standpoint of the Administration, it does not object to the presentation of the views of the Department of Defense to the Committee.

Sincerely,

WILLIAM H. TAFT IV.

Mr. IRELAND. A couple of followup technical questions.

Mr. LYNCH. First of all, if S. 1080 stands in final form as removing contracts from section 553, then the Department of Defense would oppose the bill?

Ms. BUCK. Yes, I think we probably would. I was not aware that that had been removed.

Mr. LYNCH. Did the Department of Defense testify on the bill in the Senate, the original bill?

Ms. BUCK. No.

Mr. LYNCH. Why not?

Ms. BUCK. We did submit comments, and I could provide you with a copy of the formal comments that were submitted on it.

Mr. LYNCH. I just have one final matter.

On the original question of military functions, if I can just quote Senator McCarran of Nevada, who was the original sponsor of the APA in the Senate in 1944, he said: "In doing so, the committee follows the undeviating policy of dealing with types of functions as such, and in no case dealing with the administrative agencies by name."

That point is important and I will repeat it, if I may: "The Committee has not deviated from the policy of dealing with types of functions as such, and the bill in no case deals with the administrative agencies by name."

"For example, certain war and defense functions are exempted under the bill, but there is no exemption of the War or Navy Departments in the performance of their other functions." So apparently the people who first sponsored this bill, which was during wartime, felt that at that time the War and Navy Departments had other functions. So it would amaze me if in today's world that has changed.

That's all I have, Mr. Chairman.

Mr. IRELAND. Ms. Buck, do you have anything further you want to say?

Ms. BUCK. No, sir.

[Ms. Buck's prepared statement follows:]

PREPARED STATEMENT OF KATHLEEN A. BUCK, ASSISTANT GENERAL COUNSEL/LEGAL COUNSEL, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

At your invitation, I appear before you today to provide you with the views of the Department of Defense on matters concerning the interplay between the Regulatory Flexibility Act and the mission and operations of the Department of Defense.

As a prelude, it is important to note that fundamentally the Department of Defense and the military services ardently support measures designed to relieve small business of unnecessary and burdensome regulation.

In our view, resources vital to the continued, effective maintenance of the national defense are significantly comprised of small business concerns. For our part, we endeavor to be innovative and sensitive to those small business needs that are communicated or detected by us.

While the Department reaffirms its commitment to the purposes underlying Reg. Flex., we must also pause to consider the inordinate effects of Reg. Flex. requirements in the military context. Given the critical nature of the defense role, the Department views its operations as an inappropriate subject for experimenting with remedies to ensure small business prosperity. The Congress has prudently acknowledged this tenet by linking the scope of the Regulatory Flexibility Act to rules that are published for comment pursuant to a statutory requirement. In this manner, Congress has preserved the flexibility in the executive for dealing with matters which cannot be tied to an unwielding legislative-type process.

The Department of Defense and the armed services generally are not required by statute to publish rules for comment prior to adoption as a final rule. Our regulations ordinarily fall within the military affairs functions or the agency management or public contract exemptions from the notice and comment requirements usually imposed on rulemaking by the Administrative Procedure Act (APA). The APA exemption is based on a longstanding recognition by the Congress that the functional needs of the Department in fulfilling the national defense mission would be thwarted by the imposition of statutorily required rulemaking procedures. Cumbersome rulemaking requirements which are central to the development of agency rules that are responsive to public needs, are inappropriate. In the military context, it is at least conceivable that the delay attendant to the notice and comment cycle could in some circumstances diminish the military commander's ability to effectuate prompt rules governing the command. The potential adverse effect this may have on the command under critical conditions may be incalculable.

Notwithstanding the exemption, the Department and the services publish some rules for public comment on a voluntary basis when proposed rules would have a substantial impact on the public.

Moreover, under this voluntary publication for public comment program, careful attention is given to the needs and viewpoints of small business concerns and local governmental entities. The Department has long been sensitive to the peculiar position of small business in bidding and negotiating effectively and fairly on a reasonably proportionate share of Department of Defense contracts. The extensive requirements of the Regulatory Flexibility Act, however, would as a general rule render publication for comment by defense components on a voluntary basis a counter-productive and inefficient approach for resolving small business problems.

In allocating awards within the procurement process, we seek to obtain a maximum return to the Government for the expenditure of fiscal revenues, together with satisfaction of mission requirements. Against this goal must be balanced the competing concern for the encouragement and well-being of the small business community. The small business needs continue to be a concern of the Department of Defense in effectuating procurement goals. Significantly, policy initiatives within the Department, without statutory prompting have sought to increase the competitiveness of small business and percentage of contracts awarded to small business concerns in the area of high technology research and development. Further, under Department of Defense regulations governing defense contract financing policy, as a matter of policy the Department of Defense has sought to encourage active small business' participation in enhancing small business' share of defense contract awards. We encourage small business association and representatives of small businesses to contact us directly and immediately if they encounter problems in any area of Department of Defense programs.

As a general rule the Department of Defense is vested with neither the authority nor responsibility for discharging a regulatory role in the Federal scheme. Whether extensive analytical requirements to ascertain anticipated consequences for small business should be adopted for Department of Defense rules, is being considered presently in the process of formulating the proposed legislation for a uniform Federal acquisition system proposal developed by the Office of Federal Procurement Policy. This forum is utilizing both agency and public comment to address this concern. In this manner, the commercial interests of small business are being fully evaluated in the overall context of revising the acquisition process while at the same time avoiding an imprudent burden on rulemaking essential to the Department of Defense.

It is worthwhile to remember that in a time of fiscal austerity, the optimal allocation of defense dollars has become critical. Since the business of defense is defense, man-hours assigned to assess reducing regulatory impact on small business must in our view be subordinate to alternative uses of those man-hours which are aimed primarily at a defense purpose.

Without exception, the Department of Defense consistently views congressional initiatives in regulatory reform legislation to be laudable and desirable, especially with regard to affording small business relief from unnecessary regulation. Moreover, we appreciate your understanding of the pitfalls that could be created by an indiscriminate application of regulatory analysis requirements on the defense mission.

The opportunity to present the views of the Department is greatly appreciated. We urge you to continue to review regulatory relief legislation with due regard for possible adverse effects on the mission of the Department and the armed services.

Mr. **Ireland**. We appreciate your coming and appreciate your positive effort to accommodate us. We will look forward to all the correspondence from you.

Thank you so much and, again, thanks for waiting so long. We apologize for that.

The subcommittee is adjourned.

[Whereupon, at 12:35 p.m., the subcommittee adjourned, to reconvene subject to call of the Chair.]

APPENDICES

APPENDIX A.—SUBMISSIONS OF WHITTAKER CONTROLS, INC., REFUTING TESTIMONY OF LAURENCE S. MANHAN OF EXECUAIR, INC.

WHITTAKER CONTROLS

Whittaker Controls
A Unit of Whittaker Corporation
12838 Saticoy Street
North Hollywood, California 91605
213/765-8160

August 17, 1982

JOSEPH W. STEVENS
President

Whittaker

The Honorable Andrew P. Ireland, Chairman
H.R. Subcommittee on Export Opportunities
and Special Small Business Problems
B363 Rayburn House Office Building
Washington, DC 20515

Re: H.R. Subcommittee on Export Opportunities
and Special Small Business Problems

Dear Congressman Ireland:

I am enclosing a statement by Whittaker Controls for inclusion in the records of the Subcommittee on Export Opportunities and Special Small Business Problems in connection with its hearings on the Regulatory Flexibility Act and its implementation by the Federal Aviation Administration. This statement is submitted to refute the irresponsible and unfounded allegations made by Laurance S. Manhan in his appearance before the Subcommittee on July 27, 1982.

If you or any member of the Subcommittee or staff have any questions regarding this statement, please contact me or Whittaker's Washington counsel, John Olson of Gibson, Dunn & Crutcher, Washington, DC.

Yours very truly,

hb

Enclosure

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

Subcommittee on
Export Opportunities and
Special Small Business Problems

Hearings on the Regulatory Flexibility Act and its Implementation by the Federal Aviation Administration

STATEMENT BY WHITTAKER CONTROLS

12838 Saticoy Avenue

North Hollywood, California 91605

August 18, 1982

Whittaker Controls ("Whittaker") appreciates this opportunity to respond to the irresponsible and unfounded allegations made by Laurence S. Manhan ("Manhan") of Execuair Corporation ("Execuair") in an appearance before this Subcommittee on July 27, 1982. Had Whittaker known in advance that Manhan would appear before the Subcommittee and use this forum, not to comment on the substantive proposals (NPRM 77-19C) before the Congress but rather to villify Whittaker, Whittaker would have sought to appear personally to refute Manhan's claims. Since the period for appearances by private parties has passed, Whittaker is submitting its response for the Subcommittee's records in writing.

The response contains a point by point refutation of Manhan's testimony, which is characterized at best by gross exaggeration and at worst by serious inaccuracies, reflecting either intentional deception or a negligent disregard for truth. For example, when under oath a mere ten days after his appearance before the Subcommittee, Mr. Manhan gave testimony, described below, which significantly undercut and/or contradicted his testimony before this Subcommittee. Indeed, Manhan explicitly retracted one of his allegations concerning the alleged "devastating" effects Whittaker's lawsuit had on his employees.

Whittaker's response also discusses the substantial differences between its business operations and Execuair's. In contrast with Execuair, Whittaker devotes substantial funds and personnel to design, research and development and engineering activities, operates a full-fledged quality assurance system and carries a full line of replacement parts, not just the most profitable items. These disparities create differing cost structures for the two firms and products which differ significantly in quality. Whittaker's response also considers the significant differences in the cost of making parts for the government and commercial airline.

Before addressing Manhan's irresponsible and unfounded allegations, Whittaker's response describes the industry in which it operates and the stormy relationship between Execuair and Whittaker arising out of a lawsuit by Whittaker charging Execuair with misleading customers, both military and commercial, by "palming off" its products as Whittaker's and with misappropriation of trade secrets. An understanding of this context is crucial to any evaluation of Manhan's comments.

THE BUSINESS OF WHITTAKER AND EXECUAIR

Whittaker is engaged in the business of designing, manufacturing and selling pneumatic, hydraulic, and fuel valves and other fluid control devices for use in aircraft, both civil and military, and in other aerospace applications, including NASA programs. These valves, which may consist of hundreds of parts, require periodic maintenance; component parts sometimes must be replaced. In addition to selling complete valves (which may be included on the airplane at the time of its original purchase or sold as replacement or spare parts), Whittaker also sells component parts which are used to replace worn or damaged parts.

Competition is intense among original equipment manufacturers (OEM's) for the sales of valves included on the aircraft when initially purchased. Whittaker competes with a number of companies, some of which are substantially larger in the aircraft valve market, including but not limited to ITT, Hamilton Standard, Sundstrand, Parker Aircraft, Garrett, Janitrol and a division of Mitsubishi.

The willingness to devote money, time and effort to research and development, design and engineering activities, and quality control is crucial to both success in the market and to the safety of airline passengers and military personnel carried by the aircraft using valves made by firms like Whittaker./1/ Accordingly, Whittaker devotes substantial funds and resources to such activities, in contrast with Execuair which devotes little, if any, to such activities.

For example, Whittaker's Quality Assurance Department employed 48 persons in 1982 and has been directed, since 1972, by Frank Larango. Prior to commencing his employment with Whittaker, Larango had about nine years of experience in the quality assurance field. He is registered as a quality engineer by the American Society for Quality Control and as a professional engineer by the State of California. In 1982, Whittaker's Engineering Department employed 38 persons.

1/ For example, one of the valves made by Whittaker is used in airplane engines to prevent the formation of ice in critical areas of the engine; the valve directs hot air created by the engine to those critical areas.

In contrast, Execuair personnel have testified that Execuair employs no person who serves as the head of quality assurance, material control or engineering. Gaudenzi 1982 Tr. 147-151./2/ At Execuair, these functions are carried out, if at all, by three individuals who perform basically all of the operational functions at Execuair. Id.

Moreover, Whittaker devotes substantial financial resources, as well as personnel, to the development and design of new products and has an ongoing program aimed at modifying and improving its existing products. For example, Whittaker allocated funds ranging from $848,000 in FY 1976-77 to $1,765,000 in FY 1981-82 for engineering and product development. By contrast, Execuair apparently devotes no time, money, or effort to design, research and development, or product improvement activities.

Execuair, which has chosen not to compete at the OEM level and to confine its business to selling a select, profitable group of replacement parts for use in valves designed by Whittaker, relies entirely upon Whittaker's industry and efforts in design and R&D. The drawings Execuair uses to manufacture replacement parts were developed and prepared by Whittaker. E.g., Manhan 1978 Tr. at 84-92, 169-170, 175; Manhan 1980 Tr. at 36, 77-78. These drawings, which were acquired by Execuair without Whittaker's permission, were then used by Execuair in obtaining FAA-PMA. In making its applications for PMA, Execuair simply submitted Whittaker drawings on which

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2/ The abbreviated forms of citation used herein are as follows: "Manhan 1982 Tr." refers to the transcript of the deposition of Manhan taken on August 6, 1982 (excerpts from this transcript are attached hereto as Exhibit A); "Manhan 1981 Tr." refers to the transcript of his deposition taken on May 28, 1981 (excerpts from which are attached hereto as Exhibit B); "Manhan 1980 Tr." refers to the transcript of his deposition taken on January 10, 1980 (excerpts from which are attached hereto as Exhibit C); "Manhan 1978 Tr." refers to the transcript of his deposition taken on October 19 and 20, 1978 (excerpts from which are attached hereto as Exhibit D); "Gaudenzi 1978 Tr." refers to the transcript of the deposition of Louis Gaudenzi taken on November 6, 1978 (excerpts from which are attached hereto as Exhibit E); and "Gaudenzi 1982 Tr." refers to the transcript of his deposition taken on August 5, 1982 (excerpts from which are attached hereto as Exhibit F).

Execuair placed its own label over Whittaker's name. Id. Execuair has not even taken the trouble to reverse engineer any Whittaker valve or part. Manhan 1982 Tr. at 49.

THE LITIGATION BETWEEN THE COMPANIES

Prior to 1978, Execuair did not have the FAA's permission (in the form of PMA) to manufacture replacement parts for Whittaker valves. Manhan 1982 Tr. 49-50; Manhan 1981 Tr. at 14-15; Manhan 1978 Tr. at 90. Therefore, all the parts Execuair sold should have been "surplus" Whittaker parts, that is, parts which Whittaker had manufactured and sold to customers and which were made available for resale by those customers. Instead, contrary to FAA regulation, Execuair had replacement parts for Whittaker valves manufactured by vendors and subcontractors, some of whom dealt with Whittaker, to whom Execuair supplied Whittaker drawings. Using these drawings, the vendors manufactured replacement parts for Execuair. E.g., Manhan 1981 Tr. at 16, 26. Whittaker was completely uninvolved in these activities and the parts were never submitted to it for inspection or quality control assurance.

Despite this, Execuair represented the parts to customers (military as well as commercial) as "genuine Whittaker parts". Manhan 1981 Tr. at 38-39. In selling the parts, Execuair identified them by Whittaker part number and, even more disingenuously, added Whittaker nameplates, which Execuair itself had ordered from a vendor, to valves for which Execuair had made the replacement parts. Manhan 1981 Tr. at 38-39; Manhan 1980 Tr. at 77-79. Execuair understood and intended that these actions would be interpreted by customers as identifying the parts as being made by Whittaker. Id.

Whittaker and its counsel believe these activities constituted "palming off", that is, a misrepresentation as to the source of the goods in an attempt wrongfully to benefit from Whittaker's trade reputation and goodwill. When problems developed with the parts manufactured for and supplied by Execuair, many customers returned the parts to Whittaker, complaining about the quality of the so-called "Whittaker" products sold by Execuair. Whittaker's reputation and goodwill were damaged.

To prevent continuation of these activities and additional damage to its business, Whittaker sued Execuair, charging it with misappropriation of trade secrets and "palming off". Whittaker obtained by consent a preliminary injunction, which required Execuair to inform customers that Execuair, not Whittaker, was the source of the products Execuair was supplying. (A copy of the injunction is attached hereto as Exhibit G).

In its lawsuit, Whittaker attempted to collect damages for instances of "palming off" and misappropriation prior to the filing of the Complaint. These damage claims were dismissed on the technical, procedural grounds of laches and estoppel. The Court held that because Whittaker had known about some of these activities substantially prior to filing its Complaint but had not then pursued its remedy, it was estopped, on equitable grounds, from collecting damages. (Whittaker, which believes that the Court's ruling represents a departure from established law, has appealed this decision.) The Court did rule, however, that by filing the Complaint Whittaker had put Execuair on notice that Whittaker objected to these activities and thus could sue for damages arising from new instances of "palming off."

After Whittaker sued, Execuair charged Whittaker with violations of the antitrust laws. The main claims in Execuair's lawsuit are that Whittaker violated the antitrust statutes by suing Execuair and by petitioning the FAA to rule that proprietary drawings which were acquired without the creator's consent could not be used in obtaining PMA on the basis of identicality. Execuair also accuses Whittaker of monopolizing the sale of replacement parts for Whittaker's own products, a bizarre claim. Execuair's antitrust lawsuit is in the final stages of pretrial discovery.

RESPONSE TO MANHAN'S CLAIMS

Manhan's prepared remarks are characterized by inaccuracies and exaggeration. His charges, obviously aimed at creating difficulties for Whittaker in doing business with the government, were made in a totally irresponsible fashion: virtually all of the allegations were made without any review of underlying data and were based on Manhan's highly questionable memory. Ten days after his appearance, in a deposition taken under oath, Manhan's recollection of the events about which he testified before this Subcommittee differed substantially from what he told the Subcommittee.

Taking each of his allegations in order, Whittaker will show below that they are inaccurate or exaggerated.

A. Claims Re: Vendors

In his testimony, Manhan charged that Whittaker pressured vendors into not dealing with Execuair by threatening to refuse to deal with anyone who sold to Execuair. This, Manhan claims, cut off his supply of parts.

This allegation is a complete fabrication. Whittaker has never told vendors that Whittaker would not do business with them if they do business with Execuair. In five years of discovery during the course of the lawsuits between the two companies, Manhan has been able to identify only one firm which he claims refused to do business with Execuair as a result of alleged activities by Whittaker. Manhan has never substantiated this charge, which has been categorically denied by the vendor Manhan identified.

In October 1978, a little over a year after Whittaker sued Execuair and about ten months after Execuair raised the issue of alleged coercion of vendors, Manhan was unable to recall any supplier he contacted in an effort to obtain Whittaker parts who turned him down. Manhan 1978 Tr. at 123. In a deposition ten days after his statements to this Subcommittee, Manhan was able to identify only one supplier, Anaheim Gear, which allegedly refused to deal with him because of coercion by Whittaker./3/ Manhan 1982 Tr. at 95. Although Manhan's recollection was that the last time he had done business with Anaheim Gear was sometime in the period 1973 through 1975, id., records produced by that firm in a deposition indicate that it had not done business with Execuair since 1970.

3/ Although Manhan initially claimed another vendor, Crown Valley, had ceased doing business with Execuair, he later testified that Execuair has done business with this firm through at least August 1979 and that Crown Valley did not stop doing business with Execuair as a result of any actions by Whittaker. Manhan 1982 Tr. at 96-97. It is possible that Execuair is still doing business with Crown Valley; however since Manhan's attorney instructed him not to answer questions regarding post-August 1979 dealings, this cannot be ascertained.

Moreover, Mr. John Manier, the owner of Anaheim Gear, has refuted Manhan's claim. In a telephone conversation with one of Whittaker's attorneys last week, Mr. Manier denied Anaheim Gear ever refused to deal with Execuair and said the two companies ceased doing business because Execuair stopped sending work to Anaheim Gear.

Even more importantly, Whittaker never asked its vendors not to deal with Execuair, and, by Manhan's own admission, Execuair presently does business with a number of Whittaker suppliers. E.g., Manhan 1981 Tr. at 26; Manhan 1980 Tr. at 131. Whittaker simply reminded its vendors that their agreements with Whittaker prohibited them from using equipment, tools, gauges, designs, drawings and technical or proprietary data furnished and owned by Whittaker to do work for others.

Execuair's complaint about these actions to protect trade secrets and confidential business information is disingenuous at best. Execuair argued to the federal district court that Whittaker's prior failure to act to protect such information from disclosure to Execuair precluded a lawsuit against Execuair for misappropriation of trade secrets and confidential information. Execuair is now attacking on antitrust grounds the very kind of action Execuair previously argued Whittaker should have taken to protect its confidential business information.

It should be noted that Execuair goes to great lengths to protect and keep secret its drawings on which PMA was granted, because, as Manhan testified, "I don't want any competition." Manhan 1978 Tr. at 113-114. Ironically, these very drawings were developed and created by Whittaker. Id. at 115-116.

B. Claims Re: Employees

In his testimony to this Subcommittee, Manhan claimed that prior to Whittaker's lawsuit, which was filed in August 1977, Execuair had 30 employees./4/ When his deposition was taken under oath ten days later, Manhan testified that he believed Execuair employed 12 to 15 people in 1976 and the first half of 1977. Manhan 1982 Tr. at 73. The General Manager of Execuair has estimated

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4/ Once again, in making this statement to Congress, Manhan relied totally upon his memory and did not review any documents. Manhan 1982 Tr. at 115.

the maximum number of employees Execuair has had during his fourteen years with Execuair was 12 to 15. Gaudenzi 1978 Tr. at 91.

A letter Manhan sent to the FAA in or about December 1977, attached hereto as Exhibit H, stated that due to delays in FAA action on Execuair's applications for PMA, Execuair had laid off "11 people which represents 50 per cent reduction in staff." Thus, at most, in 1977, Execuair had 22 employees.

It should be noted that the delays referred to in Manhan's letter resulted from FAA requests for additional documentation and the FAA's requirement that Execuair establish an FIS inspection system. Apparently, Manhan objected to this latter requirement, arguing that approval as an FAA repair station should be adequate for obtaining PMA. Moreover, Execuair's General Manager has testified that he had made a number of procedural errors in submitting Execuair's initial PMA applications and, therefore, was the cause of delays in obtaining PMA. Gaudenzi 1978 Tr. at 67; Gaudenzi 1982 Tr. at 57-60. Thus, it appears the delays about which Manhan complained and which caused these layoffs are not attributable to Whittaker.

After being shown his letter to the FAA and testifying that his best recollection was that prior to the lawsuit Execuair had 12 to 15 employees, and when confronted with his testimony before this Subcommittee in which he claimed Execuair had 30 employees, an error of about 100%, Manhan stated: "To be honest with you, that is probably a typographical error and I didn't even catch it until you brought it to my attention." Manhan 1982 Tr. at 119.

Manhan's testimony implied that, at present, Execuair continues to have six employees. In fact, at his deposition taken on August 6, Manhan testified that Execuair now has approximately nine regular employees and two employees who come in on an occasional basis. Manhan 1982 Tr. at 68, 69, 72. This year, Execuair has hired approximately two additional employees to work in its machine shop. Manhan 1982 at 71.

C. Claims Re: Sales

Before this Subcommittee, Manhan claimed that Execuair's gross sales declined sharply following the filing of Whittaker's lawsuit. Once again, this claim is based totally on Manhan's recollection and was made without benefit of any review of documents, Manhan 1982 Tr. at 115, despite the fact that sales figures, as Manhan has acknowledged, could be "easily picked off the ledger." Id. at 89.

Mr. Manhan never provided the Subcommittee with any sales figures to substantiate his claims. In discovery undertaken in connection with Execuair's lawsuit, Whittaker has experienced difficulty in ascertaining just what Execuair's sales were.

Ten days after his Subcommittee appearance, Manhan's estimates of Execuair sales during the period from 1976 through the present varied widely. For example, at one point, he claimed that Execuair had sales as high as $1,000,000 per annum prior to the lawsuit. Manhan 1982 Tr. at 88. At another point, he "guesstimated" 1976 sales as totalling about $800,000. Id. at 89. However, in a 1979 letter he sent to the Small Business Administration ("SBA") in connection with an SBA loan, Manhan said 1976 sales amounted to $692,000. He testified that he believed this statement was accurate. Id. at 91./5/ Thus, Manhan's deposition testimony clearly establishes that there was no reliable basis supporting his sales claims to this Subcommittee.

Although Manhan claims Execuair's decrease in sales is solely attributable to Whittaker, he has, on other occasions, complained that this drop has been caused by the FAA. As previously noted, some of the delays Execuair experienced in obtaining PMA are directly attributable to Execuair's own errors. Whittaker vigorously denies that it has violated the antitrust statutes or injured Execuair in any way.

D. Claims Re: Procurement by San Antonio Logistics Center

Manhan's claim that the Air Force San Antonio Logistics Center ("Kelly Air Force Base") "has refused to consider any of our proposals to furnish parts to the Air Force until the litigation is concluded" came as a

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5/ However, Manhan testified that he did not recall whether this figure included sales by one of his companies, Titan Pump, which is totally unrelated to Whittaker's business and whose sales have been diminishing because the market for those products "is going away." Manhan 1982 Tr. at 89. Thus, even this figure may overstate Execuair sales of parts for Whittaker valves.

complete surprise to Whittaker. Whittaker is aware of a number of contracts awarded by Kelly AFB to Execuair directly or indirectly./6/ Indeed, Whittaker was informed as recently as July 23, 1982 by Kelly AFB that Kelly had awarded a bid to Execuair. (A copy of this letter is attached hereto as Exhibit I.)

To the contrary, it is Whittaker's belief that if Execuair has any problems at Kelly they are of Execuair's own making. It is Whittaker's understanding that Execuair and Universal Aircraft, a firm through which Execuair has sold parts to Kelly AFB, are under investigation by the Air Force's Office of Special Investigation in connection with their failure to supply surplus, genuine Whittaker parts as they had represented they would. Moreover, a number of parts supplied by Execuair and Universal have been rejected as being of unacceptable quality by Kelly AFB. E.g., correspondence attached hereto as Exhibit J.

E. Claims Re: FAA-PMA

Manhan's statements concerning Execuair's success in securing PMA omit key facts. Manhan claimed that "in the last two years I have had only one PMA application approved." However, Manhan failed to state that he had made no PMA applications in 1982 and only six in 1981. Manhan 1982 Tr. at 84. Additionally, a document Whittaker obtained from the FAA under the Freedom of Information Act, attached hereto as Exhibit K, indicates that on July 11, 1980 (which misses by about two weeks the two-year period preceding Manhan's appearance), Execuair obtained PMA on 13 parts. (See Exhibit K, Supplement 10, F20-21.) A listing of PMA's awarded to

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6/ Direct contracts between Kelly AFB and Execuair include the following contracts: F04606-71-A-0100; F41608-71-D-1348; F41608-72-C1817; F41608-73-D-3190; and F41608-73-C-5609.

On a number of occasions, Execuair has sold parts to Kelly AFB through Universal Aircraft, a Florida firm. Between June 1980 and August 1981, Kelly AFB awarded Universal at least thirteen contracts for parts to be used in Whittaker valves. Contract Numbers F41608-80-C-A847; F41608-80-C-1763; F41608-80-C-B174; F41608-80-G-0047-0018; F41608-80-G-0047-0028; F41608-80-R-8345-0001; F41608-81-C-A254; F41608-81-C-A275; F41608-81-C-A344; F41608-81-C-A358; F41608-81-C-A537; F41608-81-C-A865; and F41608-81-M-2345.

Execuair produced by the FAA on or about September 24, 1980, shows Execuair had obtained PMA on at least 119 parts for use in Whittaker valves./7/ Exhibit K.

It should be noted that in December 1977, the FAA found that Execuair had violated Federal Aviation Regulations by manufacturing and selling five valves to Ozark Airlines when Execuair did not have FAA-PMA. FAA letter to Execuair dated December 5, 1977, at F362. (Copies of this letter and other relevant correspondence are attached hereto as Exhibit L.) The FAA also found that Execuair had represented the valves to be Whittaker's. Exhibit L at F363. The FAA also concluded that Execuair should be subject to a civil penalty of $5,000 for five violations (the maximum civil penalty for each violation was $1,000). Exhibit L at F360.

F. Claims Re: Prices

Manhan's claim about Whittaker prices -- that the differences between Whittaker and Execuair prices and between Whittaker military and commercial prices is not attributable to cost differences -- is simply not true.

First, Execuair and Whittaker do not use "essentially the same" manufacturing, quality control and inspection processes. Indeed, the differences in terms of employees and their qualifications, discussed earlier, shows that each company incurs substantially different costs and sells different products. Moreover, the two companies have very different quality assurance systems. Whittaker has a full-fledged "quality" system in accordance with MIL-Q-9858A while Execuair operates a less rigorous "inspection" system. Whittaker has a full-time resident government inspector, plus about six resident customer quality representatives who monitor not only in-process inspection and final testing, but also the

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7/ Finally, it is not clear that Execuair obtained only one PMA in 1981 and 1982. On July 27, Manhan claimed he had received only one PMA in two years and said that the "particular part that was approved, this sleeve, had been submitted originally in 1977." At his deposition, Manhan said he had obtained partial (not complete) PMA on one part, a spacer (not a sleeve) which had been submitted for approval in 1981 (not 1977). Manhan 1982 Tr. at 84, 86. (Execuair has not made the second application to obtain complete PMA approval for that part. Id.) Thus, it is possible Execuair has obtained PMA on two parts.

administrative aspects of Whittaker's quality assurance system and procedures.

Additionally, Whittaker's quality system must meet requirements imposed by OEM design specifications and test and acceptance criteria developed by aircraft/engine designers and Whittaker. Execuair's products do not have to meet these criteria since it does not sell to OEM's.

Second, Execuair and Whittaker incur very different costs in designing, manufacturing and selling parts. Whittaker Controls is in a different business than Execuair. Whittaker designs and develops new products and manufactures and sells these products to the aerospace industry; the sale of replacement parts is a small portion of Whittaker's business. Execuair is only in the business of selling certain selected spare parts, the more profitable items.

Whittaker incurs substantial costs in research and development, engineering, and developing new products and improving existing ones. Execuair does not. Whittaker provides a full product line, carrying all the replacement parts necessary to repair and maintain Whittaker valves, regardless of the profitability of any particular item. Execuair does not. Whittaker provides full field service. Execuair does not. Obviously, each of these activities costs money, and the differences between Whittaker and Execuair in providing -- or not providing -- such services means these two firms have very different cost structures. Indeed, these differences in services and quality assurance mean that Whittaker and Execuair do not supply parts which are identical in terms of quality.

It is very difficult for Whittaker to address Execuair's claims regarding commercial and military price differences. The chart attached to Manhan's testimony does not list part numbers,/8/ contract numbers, quantity ordered, or even dates. Thus, it is not clear that Mr. Manhan has compared prices for identical parts, for orders of the same quantity, or for the same year.

8/ The same type part (e.g., a valve) may have different part numbers because Whittaker makes more than one such part. In addition, Whittaker may make several versions of a particular part.

Whittaker, based on its experience with Manhan, questions the accuracy of the chart Manhan submitted. For example, Manhan claims Execuair sells new armatures for $35.00. However, a recent advertisement, attached hereto as Exhibit M, states that Execuair will rewind an armature (repair it, not supply a new one) for prices ranging from $20.00 to $37.50. Manhan also claims that Whittaker sold "stator motors" to the government at a price of $63.00; Whittaker has been unable to find such a contract but has found two (for P/N 154361-1) in 1978 where the price was $36.75 and $30.00, respectively. (These price differences appear to be attributable to differences in quantity.) The list also includes a "gear assembly" allegedly sold at $70.00; Whittaker has found a 1978 contract for such a part (P/N 155872-1) at a price of $45.00. Moreover, Manhan testified he was not certain all the references were to Whittaker; some, he believed, may have referred to Avco-Lycoming's prices and parts. Manhan 1982 Tr. at 123-124.

In making replacement parts for the government, Whittaker incurs different -- usually significantly greater -- costs than in making parts for commercial airlines. First, the government may require special handling and packaging. For example, in some instances, Whittaker does purchase a "standard ball bearing", as Manhan indicated. However, in some instances, it is necessary to modify the bearing so that it will function in a specific application. For example, it may be necessary to remove the lubricant in the bearing and replace it with a special lubricant required to allow the bearing to be used in a high temperature environment. On other occasions, the configuration of the bearing may have to be modified, requiring dissassembly, machining and reassembly. The labor involved in performing such operations obviously increases the cost of the bearing and may make it a different part from that which Whittaker purchased. In addition, the government generally will not accept parts in commercial packaging and requires parts to be specially packaged according to military standards so that the parts can be shipped to U.S. bases overseas and stored in any environment. Whittaker also incurs substantially higher administrative costs in dealing with the government.

Moreover, the manner in which the government and commercial airlines procure replacement parts varies and creates different selling costs. When Whittaker makes a particular part, it incurs certain "start-up" costs for such steps as the manufacturing of tooling or machinery needed to make the part and labor to set up the tooling.

If a customer can accurately predict its future need for a part (as the commercial airlines do but the government does not), larger runs of the part can be made, spreading the "start-up" costs over a larger quantity of items and reducing the per item cost. Moreover, if the customer orders parts after the initial production runs have been completed, some re-tooling costs will be repeated. And if the customer orders parts which are out of production (as the government, with its older equipment, is more likely to do than commercial airlines), the customer may have to pay for the re-creation of the tooling. Because the government tends to buy on a sporadic basis and in smaller quantities and buys out-of-production parts more frequently than commercial airlines, government purchases are often at higher prices. Because the government, and therefore Whittaker, cannot anticipate the government's future procurement needs or even whether the government will eventually award bids it solicits, Whittaker normally cannot include government requirements in runs made for other customers.

CONCLUSION

In conclusion, Whittaker thanks the Subcommittee for this opportunity to respond to Manhan's unfounded allegations and to describe the significant differences between Whittaker's business operations and those of Execuair. These disparities create differences not only in each firm's cost structure but also in the quality of the parts each supplies.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EXECUAIR CORPORATION, a
California corporation,

Plaintiff,

vs.

WHITTAKER CORPORATION, a
California corporation, dba
WHITTAKER CONTROLS,

Defendant.

No. 79-03171-CBM (Px)

Deposition of : LAURENCE STUART MANHAN
Taken by : Defendant
Commencing : 10:15 A.M.
Location : 515 South Flower Street
Los Angeles, California
Day, Date : Friday, August 6, 1982
Pursuant to : NOTICE
Before : Cheryl F. Burk, CSR 3256
Volume No. : 1

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A Well, read 21303 of the Federal Regulations. It gives you several avenues. Now, if you want me to go from memory, I will be happy to do that. Talk audibly. She can't record a nod of the head.

Q I am waiting for you to complete the answer. Yes, I would like you to answer the question.

A You can do it by reverse engineering where you can draft the part, draw the part, have it chemically analyzed, submit the data to the FAA. You can assemble a unit. If it is a whole unit you do a TSO, I think it is, type certificate, something. There are a number of ways.

Q Have you done any reverse engineering on Whittaker parts?

A No. We have used the Whittaker blueprints.

Q So in all cases you have used the Whittaker blueprints in the manufacture of PMA parts?

A That is correct.

Q When did Execuair begin manufacturing replacement parts for Whittaker valves?

A Just to clarify the question, define the word manufacture.

Q Well, I will have two difference focuses. First I will start out by asking a very narrow sense of manufacture. When did Execuair first begin to manufacture in-house one or more parts that were used on Whittaker valves?

A Under the PMA program we started in May or

June of '78.

Q Now, did you manufacture one or more parts for Whittaker valves in-house before you got PMA in May of '78?

A There are a number of Whittaker Service Bulletins that are available to the airline industry overhaul shops, et cetera, which we possess where you can take a given part number with a certain amount of machining, drilling, welding, or whatever the part needed. You could do that to the part, we identify the part as another part number. So that is why I asked you for your definition of manufacture, because John Sharer and I chased each other around the table for a couple of days on that. That Service Bulletin work we don't consider as manufacturing. John Sharer has always considered it manufacturing. So that is why I wanted the definitions out there.

Q The Service Bulletin work, to use your phrase, you did before May of 1978?

A Yes.

Q Do you recall when you first s[illegible]ed doing the Service Bulletin work?

A Probably from the day we got the first Service Bulletin.

Q Do you have any rough idea when that would be?

A No.

Q Before 1970?

that at least are under the aegis of that Execuair Corporation?

A Sometimes I work in EMC. Lou works in EMC. I will do a little bit at Titan. Lou will work in Titan. What I was giving you were the people that are there and basically where they are now.

Q And what you are saying is on a lot of these employees there is some overlap where they work at maybe two or three of the companies for some amount of time?

A Yes, like the four people in EMC. When I say part time, they only work four or five hours a day, so it is not a 40-hour week per employee there.

Q So at least your present staff is nine people; is that correct?

A Sometimes my younger son comes in. Sometimes one of my daughters comes in on a part-time basis.

Q So maybe 11 in total staff?

A Yes.

Q Now, there were two other companies that we didn't mention when we did the breakdown. Execuair Sales Corporation?

A That is just an internal company.

Q Is there any employee assigned to that company separately?

A No. I don't think it has a bank account or payroll account.

Q Titan Pump & Engineering, what are the names of the employees in that separate entity?

A It would be some of the same people. For example, if EMC were manufacturing Titan pump parts, there would be those people. If I were servicing through Execuair Service a Titan pump, it would be.

Q So Titan Pump utilizes the staff of the other four companies?

A Yes, to the limited amount of their sales, yes.

Q And there are no employees that are just separately assigned to Titan Pump?

A No. Lou spends the majority of his time handling Titan Pump business, but Titan Pump, he does not get paid out of Titan Pump. He gets paid out of Execuair.

Q So there is no additional employees separately assigned to Titan Pump that you haven't already mentioned?

A No. Correct.

Q So if I got the total right, there is 11 people who work part or full time presently for the five Execuair-related companies?

A Yes.

Q What I would like to do is take you through the period 1976 to the present and on a year-by-year basis have you give me at least an estimate of how many employees you had working in each year. Let's start with 1976, the total number of employees.

A I wouldn't even hazard a guess. I don't even recall.

after that contract was finished, we let a lot of people go. Going back to 1976 is several years ago and I would prefer rather than hazard a guess, I would prefer to have some documents that I could refer to.

Q And you haven't refreshed your recollection recently going back to 1976?

A No. I have primarily been concerned with staying in business from '77 onward.

Q You have told us what number of total employees you have now, which is 11; is that correct?

A Yes.

Q Has this total number of 11 employees stayed pretty steady for the year 1982?

A No, because we just put on -- in 1982 we put on two more people in the machine shop because we were running the machine shop, which has two people. We have Greg Parkington. He is a high school kid working part time in the summer. Lou, Larry, Dave, Vince and I. In '81 we had about six people.

Q In the year 1981?

A Yes.

Q And at some point in the year 1982 you added five more employees essentially?

A We added two people in the machine shop and then Greg Parkington for the summer. The 11 you picked up was including my son and daughter that work part time. That is not an accurate number at all.

Q Well, the 11 is full-time and part-time employees

A Well, part time like Greg Parkington is working for the summer. It is strictly a summer job. My son or daughter would come in for a few hours a couple times a week, empty wastebaskets and things like that. So that is not really a full-time job. That does not build the staff up. When you talk to me in terms of staff like the four guys in the machine shop, to my mind they are full time even though they only work half a day.

Q But they are regular day employees?

A They work basically four, five days a week for four or five hours a day.

Q But at least for the summer of 1982 you have had nine essentially regular employees that work every day and two employees of your family that come in a couple days a week?

A For example, one of the guys in the machine shop took a whole month off, so he wasn't there all last month. So it varies. The guys in the machine shop are part time. They work four to five hours a day, four to five days a week. If they want to take a month off or two weeks off, they do.

Q Of course in almost every business except the law practice, people periodically take vacations?

A You have to change that policy.

Q In 1980 do you recall approximately how many employees you had in the five Execuair-related companies?

A I am trying to remember when I hired Lester.

I think he was in early '80. We had five.

Q And in 1979 do you recall how many employees you had?

A Probably had four.

Q In 1978 how many employees did you have?

A I believe three. I am trying to recall when we hired Vince as the bookkeeper.

Q In 1977 how many employees did you have?

A I am going to say probably had a couple guys in the overhaul. This is prior to the lawsuit. Three or four. I would say maybe 12 to 15 people.

Q So in the first half of 1977 you had 12 to 15 people. In the second half of 1977 how many employees?

A Well, that is when the lawsuit hit. We were clopped. Got it down to basically three people, four people.

Q So the second half of '77 at some point you went to three to four people?

A I would say the tail end of '77. The lawsuit started in August.

Q What is your best recollection about 1976, just a range of employees?

A Just going from memory, we are sitting here talking. I would say it had to be a dozen, fifteen, sixteen employees. It would vary.

Q The same approximate range as the first half of 1977?

A I would think so.

MR. COLLINS: I will allow you to ask questions. You ask whatever questions you want to, I will allow him to answer questions that have to do about things that have actually been received by the PMA.

Q BY MR. FAIRBANK: In 1982 how many applications for PMA have you made with the FAA?

A None.

Q In 1981 how many applications have you made with the FAA for PMA?

A I think six.

Q And one of those has been approved?

A Yes.

Q And one of those six that has been approved only has engineering approval; is that correct?

A Correct.

Q Have you applied for manufacturing approval on this one that has engineering approval?

A No.

Q Why not?

A It is a small dollar item. I think the item sells for a dollar and change. We have some in stock.

MR. FAIRBANK: Off the record.

(Discussion off the record.)

Q BY MR. FAIRBANK: Let me ask a couple foundationa questions. Is it correct that there are two different branches of the FAA that you need to receive approval from to get a final PMA?

A Yes and no. May I tell you?

Q Do you have any rough idea?

A Well, the FAA has changed. The procedure, before we were sending the data to the Western Region. They have now changed The West Region, for example, handles helicopters. They have now opened a new office for the jumbo jets in Long Beach, so we send the data there. The data is then sent, for example, if it is a JT8 valve part, to Pratt Whitney in Hartford, Connecticut, who then goes to Pratt Whitney to verify if the system has change in the past year or so from what it was when we first started in '77.

Q Does this new procedure that changed in 1980 take longer to get approval for PMA?

A It is not supposed to take longer, but we still have the same, or the FAA still has the same ongoing problem with Whittaker getting cooperation that the FAA requires from Whittaker.

Q How many PMA approvals did you receive in the year 198~~5~~1?

A I believe the one.

Q Do you recall what part that was on?

A It was a spacer.

Q Now in 1981 how many applications for PMA did you make? Did you make six applications in 1981? According to our notes you testified earlier that in 1981 you made six applications for PMA: is that correct?

A I believe that is correct.

Q And you had one engineering approval out of those six?

determination on how to handle future requests.

Q Is that your only reason for making no PMA applications in 1982?

A We just received a letter from the FAA directing us to use the outside services of an engineering rep that had already been approved by Whittaker and by the FAA, so we are waiting to see how that system is going to work before we bring in some more PMA applications because there are several that they are holding.

Q And how many PMA approvals did you receive in 1982?

A None, because they are working this new system.

Q Can you estimate what the sales for the five Execuair-related companies were in 1978?

A Excluding Titan, I believe 1978 was our high point. It was about two hundred some odd thousand, less than 220,000 from a high of about $1 million prior to the lawsuit.

Q And you say excluding Titan?

A Yes.

Q So that is the other four Execuair-related companies?

A Correct. Well, EMC does not sell. EMC is in-house. They do manufacturing, so they don't really sell.

Q And do you recall what the Titan sales were in 1978?

A No, but it wasn't big because you are dealing a market that is going away because they are fuel pumps for light propeller aircraft.

A Was it greater than 100,000?

A Oh, I don't think so.

Q Greater than 50,000?

A Probably seventy, eighty thousand, right in that area, going from memory. That is easily picked off the ledger.

Q Now, in 1977 do you recall what the sales for the four Execuair companies other than Titan were?

A I think I'm going from memory. It was in the five, six hundred thousand dollar area. We had a lot of material returned, a lot of orders cancelled as a result of the start of the lawsuit in August of that year.

Q So in the five hundred to six hundred thousand dollar range?

A Yes.

Q How about 1976? Do you recall approximately what the total sales were for the four Execuair-related companies other than Titan?

A I am going to guesstimate. I think it was around the $800,000 mark.

Q In 1977 do you recall what the approximate total sales were for Titan?

A No. That is easy. Rather than guess I can get it if you have to have it or you want it.

Q Was it less than 100,000 in 1977?

A Yes.

MR. COLLINS: Counsel, we have gone over this. I remember this series of questions. I am going to have to ask you to go on to other subject matter.

MR. FAIRBANK: This will be a different series of questions. I just have a few others.

Q In the fourth paragraph it refers to sales for 1976 of $692,000; is that correct? I have about four questions in this area.

MR. COLLINS: These specific questions were asked at an earlier deposition.

THE WITNESS: There is nothing else in the letter. What else could you ask for?

MR. COLLINS: You can answer it.

Q BY MR. FAIRBANK: There is a statement in the fourth paragraph "The sales for 1976 were $692,000."

A Okay.

Q Is that an accurate statement?

A I would believe so.

Q Where would you find that figure? In what books and records?

A In the Execuair ledgers probably for the Execuair Sales, Execuair Service, Execuair Corporation.

Q And is this figure excluding the Titan sales?

A I would believe so, because it is on Execuair letterhead.

Q As far as you know that excludes the Titan sales?

MR. COLLINS: Yes, at least I don't see it at the moment.

Q BY MR. FAIRBANK: Mr. Manhan, did any Whittaker vendors stop dealing with you because of any actions by Whittaker?

A Yes.

Q Which vendor or vendors?

A Anaheim Gear, Crown Valley. Those are the only companies that come to mind.

Q Anaheim Gear and Crown Valley. I will start with Anaheim Gear. What specific Whittaker action led to their stopping doing business with you?

A Whittaker sent a letter around saying they didn't want the vendors selling excess inventory that the vendor might have.

Q So then someone at Anaheim Gear called you up and told you they wouldn't sell anything to you any more?

A No. As I recall, I called them a number of years ago. They said we had gotten a letter from Whittaker and we make the parts for them and they will buy all that we make and we don't have any surplus anymore.

Q Do you recall about when Anaheim Gear stopped selling you parts?

A I would say the last time I did business with them was in '73, '74, '75.

Q Somewhere in the early to mid-'70s?

A Yes.

Q And they told you in those last conversations they don't do business with you any more?

A Yes.

Q How about Crown Valley? Do you recall what Whittaker actions led them to stop doing business with you?

A I think it was the same, same letter. Same Whittaker letter. They said they didn't want them doing business with outside vendors.

Q This was approximately the same time period?

A Yes.

Q In other words, 1973 through '75, somewhere in that range?

A Somewhere in that range.

Q Did you do any business with Crown Valley since that period?

A Yes.

Q And are you presently doing business with them?

MR. COLLINS: I instruct you not to answer.

Q BY MR. FAIRBANK: Did you do any further business with Crown Valley up to August of 1979?

A I believe so.

Q On a periodic basis?

A No. When they had some items they wanted to sell, they would call us or we would call them.

Q So at least in Crown Valley's case they didn't stop doing business with you as a result of any actions of Whittaker; is that correct?

A Yes.

Q Can you think of any other Whittaker suppliers who stopped doing business with you as a result of an action of Whittaker?

A Well, we bought the~~ir~~ Standard inventory. Our need for outside Whittaker vendors definitely diminished. I can't think of any other than I would really probably have to sit in a quiet room and think about it.

Q You can't think of any other than Anaheim Gear?

A No.

Q Are you presently doing any business with New Hampshire Bearing?

MR. COLLINS: I instruct the witness not to answer.

Q BY MR. FAIRBANK: Are you presently doing any business with New Departure?

MR. COLLINS: I instruct the witness not to answer.

Q BY MR. FAIRBANK: Are you presently doing business with a couple of connector houses?

MR. COLLINS: A couple of connector houses?

THE WITNESS: That is definitive. I am going to answer that one.

MR. COLLINS: I instruct the witness not to answer.

Q BY MR. FAIRBANK: Are you presently doing business with some switch houses?

MR. COLLINS: I instruct the witness not to answer.

Q BY MR. FAIRBANK: Do you know whether New Hampshire Bearings is presently selling any parts to Whittaker?

there you state, "After the lawsuit we had to let go all but six employees, and I assure you we are struggling for survival. Our gross sales dropped 80 percent in 1977-78." What was the basis for that statement that your gross sales dropped 80 percent in 1977 through '78?

A Based on from memory and the figures I had seen that we were doing approximately 800,000 to a million dollars a year in sales and in '78 our sales dropped down to the $200,000 bracket.

Q So did you review documents before you made that statement?

A No.

Q So that was just based on a statement from your memory?

A Yes.

Q Your best estimate from memory was you were doing approximately $800,000 in business in 1976?

A Yes.

Q And then in 1977 that dropped 80 percent, or by 1978?

A '77, '78, because we had, as I told you earlier, a lot of material orders were cancelled. A lot of material was returned. So it was in that time frame, the tail end of '77, '78, all of '78.

Q So in other words, using that figure of roughly $800,000, and if your calculations were right, your business would have lost $640,000 over that period?

A That's right.

A That's right.

Q Then we checked that letter and it said 22.

A Yes.

Q And now you are sitting here and saying there are 30 employees; is that correct?

A Yes.

Q So this statement on Page 2 is just based on your vague recollections of how many; is that correct?

A To be honest with you, that is probably even a typographical error and I didn't even catch it until you brought it to my attention.

Q But you don't know either way whether it is a typographical error?

A I don't know. It was typed by a girl in Washington, D.C.

Q But you didn't check any documents before you gave that estimated figure of employees; is that correct?

A I checked the documentation. It was pertinent to the overcharging of the government and the parts we were talking about. That I checked against the documentation to make sure it was accurate and to the point and correct.

Q But you didn't check the figures on Page 2 that we are talking about?

A What figures are you talking about?

Q The 30 employees and the sales drop of 80 percent.

A The sales drop of 80 percent is from my memory, and 30 employees could have been a typo.

Q But you didn't check either of those based on and inspection data, all the stuff that went with it. We gave everything we had and he verified the material and stock. It was sitting there on the shelf. It was new and unopened packages. There were several items, and I haven't heard from him since.

Q When did he come out to meet with you?

A I believe it was sometime in March. I am trying to think of whether it was the front half of March or the back half of March.

Q Sometime in March, 1982?

A Yes.

Q And you have heard nothing from him since he came to visit you?

A He also has a number of those Whittaker contracts

Q Would you turn to Page 7. This is the overcharge price list charge which is the last page of Exhibit D. The second and third columns refer to "Types Certificate Holder." Is that correct?

A Yes.

Q Who are you referring to?

A I believe they are referring to Whittaker. I didn't make this chart.

Q Who made this chart?

A This chart was made by a girl in Beckman's office.

Q But did you give them all the background information for this chart?

A I don't know if on this charge they are referring to Whittaker items or Continental Teledyne, Avco-Lycoming items, because the other gentleman that was involved was Dedman from Superior Air Parts. He had some parts, so I don't know because they have no part number. They have no part number, so I don't know. Just going from nomenclature whether it is like the one that says spring, is that a valve spring or a valve spring like a valve on a propeller engine or is it a coil spring out of a valve. I don't know.

Q Look at that two, for example, that refers to base plates. Do those prices look identical or similar to the prices you referred to in the example you gave to the Committee?

A On that one, yes.

Q So on that one at least you are confident the type certificate holder is Whittaker?

A Yes.

Q Look at any of the other examples. Do those look like prices that you are familiar with for Whittaker?

A I would have to go through all of the 50 or 60 contracts and backup data and sent and verify it by price, because I deal in part numbers, you know, not nomenclature. So I don't know.

Q Are there any others that in just looking at them you recognize the Whittaker prices?

A I recognize the next to the last item. That is a body. We have PMA on that. Tinker had approved us as a vendor and then through Whittaker's interference got

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EXECUAIR CORPORATION, a California corporation, Plaintiff, vs. WHITTAKER CORPORATION, a California corporation d/b/a WHITTAKER CONTROLS, Defendant.	No. 79-03171-CBM

Deposition of : Laurence Stuart Manhan
Taken by : Defendant
Commencing : 9:30 a.m.
Location : 515 South Flower Street
Los Angeles, Ca.
Day, Date : Thursday, May 28, 1981
Before : Elaine B. Smith, CSR 3366
Volume No. : 1

percentage would you say belongs to Execuair?

A I have no way of knowing what the other people do. I can only cite what my sales were before the lawsuit in '77 and what they are today.

Q So, in other words, you have no idea as you sit here today of what percentage of competition for the sale of replacement valves and parts you occupy with respect to Whittaker?

A I was the only company Whittaker sued. I don't understand why they didn't sue all of the other surplus dealers as well.

Q Just respond to the question.

A I gave you my response, counsellor.

The other companies sell engine parts. Their dollar value could be twenty million. What percentage Airmotive's dollar value would be to Whittaker as comprised of their entire total dollar value I don't know, but I imagine we could find out.

Q Do you have any knowledge as to the amount of sales which these other entities may have made over the years of replacement parts and valves in competition with Whittaker?

A No.

Q When did you begin manufacturing parts under the PMA program?

A We've gone through this twenty times.

Q Please answer the questions.

A We started in October of '77. We received our first PMAs in May of '78 and have been receiving them subsequently since then.

Q Prior to that how would you describe Execuair's business?

A Prior to manufacturing under the PMA program?

Q Yes.

A Buying and selling surplus from vendors or airlines, machine shops, auctions, just buying and selling merchandise, doing overhauls.

We've been an overhaul shop since 1970. So, doing overhauls, reprocessing, service bulletin work.

Q Prior to October 1977 did you manufacture any parts or valves for --

A We've been --.

Q Let me finish the question.

Have you manufactured any parts or valves as replacement items for Whittaker valves?

A We've been down this road. We manufacture per the service bulletins and the service letters as authorized by the FAA.

Q You manufactured no other items?

A No, sir. Of course, let me ask you so we don't get into the snafu we've been in. Please define "Manufacture

Q What do you mean by "manufacture"?

A What do you mean by "manufacture"?

Q It's my deposition, Mr. Manhan. I'll ask you the questions. What do you mean by the word "manufacture" when you use it?

A Take a piece of bar stock and you make the part from beginning to end. That is manufacture.

Q Prior to October of 1977 did you have any parts or valves to be used as replacement items manufactured for you?

A Well, we went through this before. Some of the machine shops that we bought from as Whittaker vendors. We do not know whether they had the item on the shelf or they made it to our order.

Q You have no idea whether those items that you purchased from vendors were overruns or specially manufactured

A Have no idea. We didn't ascertain that at the time

Q Since 1977 have you ever manufactured in house a part or a valve on which you did not have PMA?

MR. COLLINS: Any part, any valve?

MR. BENNETT: Yes.

THE WITNESS: That's a hard question to answer for this reason. We did service bulletin work and we subsequently have found out that Whittaker didn't have PMA on the parts at the time the service bulletin was written, and we did perform work to an approved Whittaker service bulletin. So, I don't know if you would fall that into the category of manufacturing a part that we did not have FAA-PMA on.

Q BY MR. BENNETT: When I use the term "manufacture" I'm using it in terms of the definition that you give to the term "manufacture," Mr. Manhan.

After October of 1977 have you manufactured in house any parts or valves on which you did not have PMA?

The PMA items go out on an Execuair Corporation invoice with the E and clearly marked on the invoice it's PMA. The surplus items we would get shipped out as Execuair Sales and the sticker that we agreed to put on the invoice is on the invoice and goes with the parts, et cetera, et cetera.

Q How long has that procedure been in place at the company?

A We just put that procedure in place to eliminate confusion after we received our first PMAs so that we could have a line of delineation between Execuair PMA and surplus.

Q So, the procedure was initiated in approximately May of '78?

A Yes. Well, not exactly -- yes, May of '78, but we didn't start manufacturing until probably two or three months later.

Q You say that prior to getting PMAs in May of '78 you purchased material from a number of Whittaker suppliers which you did not know whether it was specifically manufactured or was Whittaker's overrun, correct?

A That's correct.

Q Have you continued that activity after getting PMA?

A There are some vendors that I believe we are still doing business with.

Q Which vendors are those?

A I just got some items in from Crown Valley Threaded Products, Parco O rings, ITT Cannon, New Hampshire Bearing.

Q Any other vendors?

that you obtained from Whittaker suppliers to be genuine Whittaker parts?

A Yes.

Q What is the reason that you consider that to be the case?

A They were made by a Whittaker vendor and approved Whittaker vendor and they were made to the Whittaker print and that made them a Whittaker part.

Q I assume you subsequently made sales of a number of these parts, is that correct?

A Yes.

Q On the invoices that accompanied the part that was sold did you use a Whittaker part number to identify the part?

A You're going to have to go by a time frame.

Q Were there any times when you sold such parts using a number other than a Whittaker part number?

A When we sell an Execuair manufactured FAA-PMA part we put an Execuair part number on it.

Q I'm only referring to parts which you obtained from Whittaker suppliers.

A Okay.

Q With respect to those parts when you sold them did you identify the parts on the invoice by using a Whittaker part number?

A Yes.

Q Did you do that invariably?

A That's how the parts were ordered by us. That's how the parts were ordered by the customer and they bought them from us.

Q So, your answer is yes?

A Yes.

Q Was it your intention in describing the parts in that manner to represent to the customer that they were buying a genuine Whittaker part?

A They were a genuine Whittaker part.

Q Was it your intention to so represent that to the customer?

A I don't know whether it was the intention. That's what the man bought. That's what we sold him.

Q Did you consider that the customer would interpret the invoice as identifying a genuine Whittaker part?

A The part was a genuine Whittaker part. We sold it as a genuine Whittaker part. We invoiced it as a genuine Whittaker part.

Q So, I take it you intended the customer to believe it was a genuine Whittaker part?

A It was a genuine Whittaker part.

Q Is your answer to my question yes?

A You just got the answer. Yes.

Q When you put the parts that you had received from Whittaker suppliers into your stock of inventory were they mixed in with surplus parts?

A They were all surplus.

Q Did you consider parts which you received from Whittaker suppliers to be surplus parts?

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WHITTAKER CORPORATION and
DYNASCIENCES CORPORATION,

Plaintiffs,

vs.

EXECUAIR CORPORATION, EMC
MANUFACTURING CO., INC.,
and LAURENCE S. MANHAN,

Defendants.

No. 77-3261-MML.

DEPOSITION OF LAURENCE S. MANHAN

Taken on behalf of the plaintiffs and counter-defendants, at 515 South Flower Street, 46th Floor, Los Angeles, California, on Thursday, January 10, 1980, commencing at 10:32 A.M. before Daniel G. Minjares, CSR No. 2021, a Notary Public for the State of California, pursuant to stipulation.

RACKLIN, BERNSTEIN, MINJARES & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
SUITE 206
1250 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017

how was that done?

A They were for a while, and then we just had so many of them, we just threw them in the file cabinet. You would go through them and look at the print. If it was a part we thought that we -- that we owned or that we would be inspecting at some point, we kept it out. We have prints for Whittaker parts we have never seen.

Q But the ones that you thought that you might have use for, you did place in separate files?

A Right.

Q Were they placed in files with the lowest number first, or how was that done?

A Yes, the normal numerical sequence.

Q Was there a document showing what that particular part number was so that you could know which one you wanted when you wanted one?

A No, just went to the cabinet. You would look to see if you had it.

Q Now, you made these drawings available to certain suppliers at one time or another, or at least some of them?

A Yes.

Q And did you do that for purposes of having a part made for you?

A For buying a part, primarily. I don't know whether they made it or they may have had the part on the shelf and didn't know to what letter change they had the part, and they needed a print to check it. So we supplied

Q Or on those subassemblies?

A Subassemblies do not have a nameplate.

Q Did you include the Whittaker name in connection with any of the package of parts or parts that you sold to any third persons at any time before mid-1977?

A Everybody in the industry knew we dealt in Whittaker parts.

MR. SHARER: I don't want you to tell me what you think everybody knew. I want you to answer my questions.

Would you read the question back.

(Whereupon the last question was read by the reporter as requested.)

THE WITNESS: Not that I recall in the package of the name.

MR. SHARER: Q Well, did you ever represent any o. the parts that had been manufactured by you or for you as being Whittaker parts?

A They are Whittaker parts.

Q Did you represent them as such?

A I sold them as Whittaker parts, yes.

Q And you put the Whittaker name on those in connection with those parts?

A No, not the name. The --

Q What did you put on them? The logo?

A Prior to '77 -- No, the part number. We deal in part numbers.

Q Is it your testimony that at no time did you use the Whittaker name or the Whittaker logo in connection with the parts to any third person?

MR. LIBOTT: Mr. Sharer, I think we have gotten confused in this parts, subassembly, valve problem. You have been asking about parts, and then sometimes you have asked him about subassemblies. You have never asked him about valves, and I think that is maybe what is happening here.

MR. SHARER: Q Did you use the Whittaker name in connection with anything that you sold to any third person prior to mid-1977?

A We dealt in Whittaker part numbers or Whittaker name or nameplate on a valve assembly.

Q You did use a Whittaker nameplate on a valve assembly which had been put together by you or for you?

A Either put together, overhauled or assembled from the end assemblies.

Q Who produced that nameplate for you?

A It could hxxe come from stock. It could have come from a service bulletin kit, service letter kit, from Whittaker, Standard Aircraft or Nelson Nameplate.

Q Did somebody manufacture any nameplates for you?

A Nelson used to make them for us. We used to -- They were the Whittaker vendor for the nameplates.

Q Did you tell them how you wanted that nameplate to appear?

A No, just called up, gave them the part number, and they made the nameplate to the part number.

Q And it was your desire that this nameplate that was to go on the Whittaker valve which you were having manufactured and sold was to be identical with the one that was used by Whittaker with respect to the valves that were made by them or for them?

A The word "manufacturing," having the valve manufactured, is not a correct statement.

Q But it was your intention to cause your customers to believe that the valves you were selling were manufactured by or for Whittaker; is that correct?

A Yes.

MR. LIBOTT: Just a moment. I think that goes to state of mind and is an improper question. I will object to it as phrased.

MR. SHARER: It goes to his intent. I am entitled to know what his intent was as to why he was doing the things he was doing, whether it was by accident or whether it was by intent.

MR. LIBOTT: All right. I will withdraw the objection.

MR. SHARER: Q Let me rephrase the question.

A Okay.

Q Was it your intention in affixing the Whittaker nameplate as manufactured or as prepared for you by Nelson to convince the customers of yours that what they were purchasing was a valve made by or for Whittaker?

A That is what they were buying, and that is correct.

Q That is what you intended to convince them?

they had made them to that order, that I can't say.

Q Can you tell us whether in the purchase orders where you were asking somebody to manufacture something as opposed to asking them for something which you believed they already had in stock for some reason, whether the purchase order would look any different?

A No.

MR. LIBOTT: Does that mean no, you can't tell, or no, they would not look different?

THE WITNESS: Both. both noes. I couldn't tell and the purchase order wouldn't look any different, plus in a lot of cases we ordered verbally. You know, we didn't use purchase orders all the time.

MR. SHARER: Q Who is M. Appleton, if that is Appleton?

A Somebody who used to work there.

Q At your place?

A Yes. I think he was a young kid going to school. He was in the Peace Corps or he is in the Peace Corps.

Q You can't tell from looking at this invoice, for example, whether you were supplying Crown Valley at this time a drawing or whether you had a drawing for this item or anything else other than what is on here; is that right?

A Purchase order.

Q This purchase order.

A You said "invoice."

Q Would you tell them in advance with this particular order that you would need a drawing or you wouldn't need a drawing?

A No, I think it would probably come at the time of delivery or at the time they were going to do whatever they were going to do with the part.

Q When was the last time that you ordered parts from a supplier up to today?

A I order parts all the time.

Q Whom are you using today as your suppliers?

A I will have to check. You know, Parco, New Hampshire Bearing. I think we bought some items not too long ago from Crown Valley. I would actually have to check the purchase orders.

Q Who is your major supplier at the present time?

A For what items?

Q In terms of volume.

A Myself.

Q Other than yourself, what outside source?

A A couple of rubber houses in town, New Hampshire Bearing, New Departure, a couple of connector houses, switch houses.

Q Are these, all of these companies, companies that have or have not been at one time a supplier to Whittaker?

A Have.

Q And have you exercised your normal policy of

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WHITTAKER CORPORATION AND)
DYNASCIENCES CORPORATION,)
)
Plaintiffs,)
)
vs.) Civil No. 77-3261 MML
)
EXECUAIR CORPORATION, EMC)
MANUFACTURING CO., INC.,)
AND LAWRENCE S. MANHAN,)
)
Defendants.)
)
)

DEPOSITION OF LAWRENCE S. MANHAN

Los Angeles, California

October 19, 1978

Volume 1

October 20, 1978

Volume 2

L. R. LINN & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
SUITE 100
ONE BUNKER HILL BUILDING
601 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90017
(213) 626-7674

A Yes.

Q And the left-hand margin of it has the printed word "heat treatment" at the top and the right-hand margin has a line and immediately above the line Item "NO." in print, is that correct?

A Yes, but those words aren't ours. That's part of the print.

Q So that everything to the left of it as you look at it is yours up to the line which we previously referred to?

A Correct.

Q You've told us that the document in this form as we see before us as Exhibit W was what was presented to the FAA for the purpose of obtaining a PMA.

A Yes, sir.

Q In this block which you have added there is some handwriting, some of it printed, and it looks like a signature and some initials. Do you know whose handwriting any of that is?

A Yes.

Q Looking at the far left where it says "Note 5" and "Note 4" in handwriting, whose handwriting is that?

A That could either be mine or my son David.

Q But are you certain enough to tell us here that it's got to be one or the other of you?

A Yes.

Q Why do you say that?

A Because we went through -- or I went through and pulled out the prints that we wanted to present and had them -- this is a self-adhesive label and we made them out and then just labeled them and stuck it on the print per the FAA instruction.

Q What the FAA had told you was you should put your own name on the print before you submitted it, is that correct?

A Yes.

Q What does "Note 5" refer to?

A "Note 5" refers to the note over here on the left-hand corner of the print, lower left-hand corner, Note 5.

Q "Note 4" similarly refers to Note 4 on the left-hand margin also?

A Correct.

Q The reference you've made to the left-hand margin and the information under 5 and 4 were on the document, Exhibit W, at the time you first obtained it, is that correct?

A Yes.

Q Moving along in the block that you added to Exhibit W there is a heading that says "Material" and under that there is a handwritten statement that says "Steel, CR, Holly or Holy" -- H-o-l-y, looks like.

A Moly.

Q M-o-l-y, "4130 per mil-S-6758." Is that c-o-n-d?

A Yes.

Q "F(RC2531-)." That's all the material that's in the box that is headed "Material."

A Right.

Q Who put that in there?

A That appears to be David's handwriting.

Q Do you know what that refers to?

A Yes, the material that the part is to be made out of. This was just copied from what's underneath.

Q In other words, up to the point we've gone so far, the material that is handwritten on the slip that you attached to Exhibit W is merely a copy of what Whittaker had put on the document and which if we could take this off would have appeared underneath it?

A We just overgummed it with our label per the FAA requirements for getting PMA. They said, "Make no change. Just put your name on it," and you can do it any number of ways and we chose this method, and we just took the information that was there, put it on our label, pasted it on and submitted it to the FAA.

Q In the next block under what we just read is the printed word "Drawn by" and then "Date." Then under the printed word "Drawn by" there are what appears to be some initials. Do you see that?

A Correct.

Q You're familiar with these types of forms, are you not?

A Right.

Q Ordinarily the entry under "Drawn by" would be the initials or the name of the individual who had drawn the drawing, is that correct?

A That is correct.

Q Whose initials are they under the printed words "Drawn by"?

A They are my initials.

Q Did you, in fact, draw the drawing which appears as Exhibit W?

A No, but we submitted it to --

Q No, I just asked you if you drew the drawing. Did you?

A No.

Q Next to the words "Drawn by" in that same box is the printed word "Date." Under that appears the date of 5/18/78.

A Right.

Q As you understand these documents this is supposed to represent that the individual who has indicated he drew it had drawn it on a particular date.

A True.

Q When did you obtain Exhibit W?

A I don't recall.

Q But the drawing had been so far as you know completed by Whittaker employees years before that May 18, 1978, is that correct?

A I would have to assume that.

Q Did the gentleman of the FAA tell you -- strike that.

Underneath this what do you call this thing?

A A label, title block.

Q Underneath this title block which you've described for us by its dimensions and so forth, you have told us that Note 5 and Note 4 which are written in in either your handwriting or your son's handwriting are identical with what was written in there originally by Whittaker employees.

A True.

Q I assume -- and I'll ask you to tell me if I'm wrong -- that the information under "Material" which is written in your handwriting or your son's handwriting is identical with the writing -- not handwriting, but the material that was inserted in that block by Whittaker employees earlier.

A True.

Q What was indicated in the blocks under "Drawn by" and the date in the Whittaker drawing before this paste-on was applied?

A The name evidently of the person who drew it for Whittaker.

Q And the date upon which he drew it?

A Correct.

Q The next block underneath "Drawn by" and "Date" is headed "Checked and date" also.

A Right.

Q Do you know what is meant in the industry by those terms in that block?

A Yes.

Q What is that?

A Somebody drew it, somebody checked it, somebody approved it.

Q What do you understand to be the meaning as you've used it in this block of the term "Checked"? What is "Checked"?

A It's a standard term in the title block not always used, but it's there to indicate that that individual print had been checked by someone.

Q Checked for what?

A Specifications, correct material, just generally gone over and checked for accuracy, for correctness, but it doesn't always apply in a simple part such as that.

Q In the original drawing as you obtained it before you applied your Execuair name plate there what, if anything was under those sections?

A I don't recall.

Q When I said "sections" I meant "Checked and date."

A I understand.

Q If there had been something on the original Whittaker drawing of Exhibit W in that block, would it be your practice to put something in that block yourself?

A No, we were told when we applied for FAA to put a current responsible person in the "Drawn by" because effective that date when we made application for PMA we would then be responsible for that drawing to that letter change. So, they said, "Put a responsible person in that category and put a responsible person in the approved category."

Q Do you recall who at the FAA told you those things?

A No, because I talked to a number of people at the FAA here and in Washington, D.C.

Q Was the information about filling in these blocks given to you by FAA personnel that were located in Los Angeles or those located in Washington or both?

A I honestly don't recall. I spoke to a ton of them.

Q When was that information given to you; that is to say, how to fill in these blocks?

A In the very beginning when we applied for PMA.

Q Which was when?

A In 1977.

Q Did you initially submit the drawings to them without those blocks filled in?

A You say "not filled in." You mean somebody from myself or my company signing them?

Q Let me back up a bit. When you first applied for PMA -- we'll use this Exhibit W as an example -- did you submit a drawing without the Execuair name plate pasted over the Whittaker name plate?

A No. We did what they suggested. We took a drawing, a copy of it, left it the way it was and took a -- the same drawing, pasted the title block on it, and submitted the two drawings for what they called identicality.

Q This was the instructions of the FAA?

A Yes, sir.

Q At the time you got those instructions did they instruct you also to fill in the blanks on the pasted over Execuair name plate?

A Only those that applied.

Q Under "Approved" and "Date" on this particular document appears a -- looks like a signature, and next to it the date of 5/23/78. Can you tell me whose signature that is?

A My son David.

Q Next to that the date of 5/23/78 is that the date that ordinarily is indicated as being the date upon which the drawing was approved?

A The date that -- actually what that indicates is that that's the date we processed that drawing and sent it to the FAA for PMA.

Q Did you say the "Drawn by" initials were yours?

A Yes.

Q Did the FAA tell you that you should have different people indicated as having drawn the document and approved the document?

A You should have responsible people who have control of the document and will be handling the manufacturing of the item review the document and be involved with the document.

Q But did they tell you, the FAA personnel, that in the block under "Drawn by" you should use a different name in the block under "Approved"?

A No, I just think we did that -- I went through them up to a certain point. I'm in and out of town and traveling around. My son picked up that particular one and finished it up and submitted it.

Q How old is your son?

A Nineteen.

Q Is he a qualified engineer?

A He holds an A.N.A. license.

Q Is he a qualified engineer?

A No.

Q Is he a qualified draftsman?

A No.

Q Does he draw for you blueprints of parts to be used in aircrafts?

A No, you don't draw the prints. We're using existing prints.

Q What, if anything, did your son do with respect to approving this drawing?

A Nothing.

Q What did you do with respect to confirming the appropriateness of this drawing?

A Not a thing.

Q You said you've talked to people in the FAA both in Los Angeles and Washington, but you cannot tell us who gave you the instructions or information about this particular block. Can you tell us the names of the people at the FAA that you talked to generally, whether or not they were the ones who actually told you about the data

A Counselor, those are the drawings submitted. There was no difference between what is on the table that were attached to my affidavit and what are sealed. If you want to see the sealed drawings I'll be happy to bring them up, but I can't let them out of the facility for any length of time.

Q Why is that?

A Because you're supposed to maintain a tight control over your drawings that you have FAA-PMA on.

Q Why?

A If you want to see the seal that's embossed on each one of the corners, I'll be happy to make them availabl to you.

Q Why do you keep tight control over the documents that you've received FAA-PMA on?

A For safety reasons and for manufacturing reasons they want you to maintain tight control.

Q Who told you that?

A The FAA. That becomes a sealed drawing. That's the drawing that I must use to make the parts.

Q Have you had any other parts that you received PMA for manufactured by any outside supplier?

A No.

Q When you say you keep tight control over them what do you do with them?

A Keep them in a safe place.

Q When the time comes for manufacturing the parts who do you give access to those drawings?

A We don't give anybody access to the drawings. We supply that portion of the drawing that pertains to that part of the manufacturing technique that that individual has jurisdiction over.

Q What is it that you're trying to protect?

A I don't want any competition.

Q Is it your belief that unless you give access to those drawings to somebody else that it would be very difficult for that competitor to compete with you?

A You just don't run up and down the street passing out your drawings.

MR. KASSAN: At least you don't.

THE WITNESS: I don't. We don't. Titan Pump doesn't.

Q BY MR. SHARER: Who?

A Titan Pump doesn't. We send out a job for bids, we send you out a print with only that detail on it sufficient to know. You never get a complete print out of our shop.

Q Have you given a print to anybody for any purpose outside of your shop?

A Titan Pump, yes.

Q Anybody outside of Titan Pump?

A Yes, since we're PMA we have sent out some prints in very restricted areas to get ball park bids.

Q To who?

A A couple of shops, local shops, on the street.

Q Names.

A Finn Tool across the street.

Q How do you spell that?

A F-i-n-n.

Q What's their address, if you know?

A No, I don't. It's catty-corner across the street from us.

Q In other words, they are on --

A Remmet.

O Same street as you are on?

A Yes.

Q What kind of outfit is Finn Tool? What do they do?

A Manufacturer.

Q With whom have you dealt with over there?

A Just showed it to the shop foreman, walked in the side door.

Q What's his name?

A I don't know.

Q Do you have access to that information anyplace?

A I could go back across the street and ask him what his name is.

Q In other words, you just walked across the street with one of these Whittaker drawings and showed it to him for purposes of --

A I walked across the street with an Execuair drawing and showed it to him.

Q Is this a drawing that you created?

A It's a drawing that I have FAA-PMA on to manufacture.

Q It was a drawing that was created by Whittaker.

A It is now an Execuair --

Q It is a drawing which Whittaker created, is that correct?

A That's a safe assumption.

Q And the only difference between it is that you put your name on it, is that correct?

A That is correct.

Q That in your opinion makes it an Execuair drawing?

A With the FAA-PMA approval, yes.

Q When you went across to the Finn Tool Company -- which drawing did you take over there?

A I don't know. It was a simple shaft.

Q When did you do that?

A May, June. I don't recall.

Q Of this year?

A Yes.

Q Did you leave that drawing with the foreman at Finn Tool?

A No, just something we talked about when the coffee truck was there.

Q You took the drawing there with you?

A Yes.

Q And you showed it to him?

A Yes.

Q What, if anything, did you tell him about the secrecy of that drawing?

A Nothing, just asked him to look at the part and give me a ball park figure on making them.

for those microfilms of drawings of Whittaker parts.

A Yes.

Q Did you ever pay anybody else either money or other consideration in return for providing you with drawings or other documents concerning Whittaker parts?

A No.

Q That was the only occasion?

A The only occasion.

Q We have discussed a number of suppliers in connection with some of these parts. We've talked about Gear Train, Zaco, Fred Schroeder and perhaps some others. Did you ever contact any supplier in an effort to obtain Whittaker parts who turned you down?

A I don't recall. Usually we're doing business with a shop and he knew that another shop is doing business he said, "This guy is stuck with a bunch of Whittaker parts. Why don't you call him?"

Q Did anybody ever tell you that they would not supply you with parts because it was not proper to do so or words to that effect?

A Not that I recall.

Q You told us this morning -- we'll get back to these in a minute -- but you told us this morning that you have received PMA on the parts depicted in the drawings attached to your affidavit we've been talking about, is that correct?

A That is correct.

Q You also told us this morning that you had then -- manufacturing then sends you another letter, a second letter, which says, "Permission is granted to manufacture and sell these items providing you mark them," et cetera, according to all the FAA regulations.

Q You said something about the FAA returned to you sealed certain materials.

A No, sealed drawings.

Q Sealed drawings. Is this standard procedure as you understand it?

A Yes. I have to say yes because it's the only procedure I'm familiar with.

Q They send you back the drawings you submitted to them?

A Yes, sir.

Q They keep copies?

A As I told you yesterday, we submitted three drawings, one Whittaker drawing, two drawings with our plate block or title block or nameplate. We've called it everything yesterday. They keep one of our drawings that they seal in their file. They send one back to us.

The Whittaker drawing we told them they could either throw it out, return it, whatever they wanted to do with it. In most cases they kept the Whittaker print, and I'm sure stuck it in the folder with our prints in file as a backup.

Q When you prepared this affidavit and you looked in that bundle of documents that the FAA had returned to you and responded to these questions that that was what was submitted to obtain a PMA?

A Counselor, I went through it with you yesterday and, please. I told you that I personally took every one of the FAA-PMA sealed drawings to the Xerox company around the corner from my office. I stood there while they made three copies or six copies, returned them to Mr. Jessup's office one for one all the way down the road.

The sealed documents I told you you are welcome to look at. I cannot leave them out of the office. They must stay there. You're welcome to look at them.

The Xerox copy machine will not -- it's an embossed stamp, like a corporate seal stamp is what they seal the drawing with.

Q This is a different question. What I'm saying is the information that is contained in your affidavit relating to what was submitted to the FAA upon which you say PMA was granted is copies of what was submitted to the FAA with the Execuair block on it.

A Yes, sir.

Q In other words, so we understand each other, what you submitted to the FAA to obtain PMA on the parts was one copy of the Whittaker drawing for a particular part and two copies of that same drawing with the Execuair block covering up the Whittaker block.

A True.

Q What you're saying is that the FAA when it granted the PMAs retained the drawing with the Whittaker block on it and one copy of the Whittaker drawing with the

the first time that you've had an opportunity to look at that set of documents in that form, either the originals or copies?

A Do we have a set of those?

MR. JESSUP: Do you want me to help?

MR. SHARER: Let me just clarify. It may help you.

Q In connection with a prior motion that the plaintiffs served and filed sometime ago, a set of these documents -- I think in the form that you've just looked at -- were served on your counsel. Whether your counsel showed you those or not --

A They look vaguely familiar, the blue.

Q Having had an opportunity to look at those at least briefly -- I don't mean that you've had a chance to examine them in great depth -- but returning again just for sake of example to Drawing No. 126360 without regard to the nameplate or the block-out in the top left-hand corner, is this one of the parts, one of the Whittaker parts, upon which you sought PMA from the FAA?

A Yes. I have it.

Q From what you've told us -- and I don't mean to belabor it -- that part, the application for PMA on that part would have entailed by you submitting one copy of a Whittaker drawing and two copies of the same drawing with the Execuair block replacing the Whittaker block.

A Correct.

Q When you got -- what you received back from the FAA in connection with Part No. 126360 is one of the

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WHITTAKER CORPORATION AND)
DYNASCIENCES CORPORATION,)
)
Plaintiffs,)
)
vs.) Civil No. 77-3261 MML
)
EXECUAIR CORPORATION, EMC)
MANUFACTURING CO., INC.,)
AND LAWRENCE S. MANHAN,)
)
Defendants.)
)

DEPOSITION OF LOUIS GAUDENZI

Los Angeles, California

November 6, 1978

L. R. LINN & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
SUITE 100
ONE BUNKER HILL BUILDING
601 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90017
(213) 628-7874

assemblies is how they called it. When I say "final," it is to the end airplane, which was apparently causing some confusion, and at that point I believe they sent these back or I picked them up. We subsequently got them back.

Q I see. Did you tell Mr. Manhan that the submission to the FAA or the particular drawings had been returned to you?

A I believe so.

Q When was that?

A I don't recall exactly when it was.

Q Was it more than six months ago?

A I believe so. I believe so.

Q It was more than a month ago, wasn't it?

A Oh, yes.

Q Did you show Mr. Manhan what had been returned to you?

A I believe so. I believe I gave him the stack.

Q What did he tell you to do then?

A Well, quite frankly at that point I pretty much gave it over to him. Like I said, I obviously had done something, or I felt I had done something that was causing them to hold it up, and it appeared to be the numerous applications to the end airplane.

Q Did it come to your attention that the FAA found it improper merely to place the Execuair name over the Whittaker name as opposed to replacing the whole title block?

A I'm sorry, I don't understand that.

MR. SHARER: Just a minute.

(Recess.)

Q BY MR. SHARER: During the time that you have been employed by Execuair, what is the maximum number of employees that Execuair had?

A I am going to have to guess.

Q Give us your best estimate, if you can.

A Maybe 12 to 15.

Q How many employees does Execuair have now?

A Three.

Q When was the last time that you can recall that there were more than three employees there?

A That has been quite a while. It has been quite a while.

Q More than a year?

A Possibly a year.

Q Between a year and two years, something like that?

A I would think maybe a year, nine months, ten months, in that area.

Q What was the number of employees at that point right before it came three?

A I'm sorry, I don't--

Q You say there are three now, and about nine months to a year ago there were more. How many more were there?

A There were possibly -- again, maybe six, maybe eight.

Q Did something occur in the business of Execuair that eliminated those jobs, if you know? In other words, by you in 1977?

A That is what I was trying to say. I don't remember whether there was one part per application. I don't recall what that was.

Q But the 10 to 50 estimate that we talked about was the number of applications; is that right?

A I guess I confused you. That was the number of parts.

Q You did confuse me. I apologize. Let me just clarify. The 10 to 50 estimate that you gave earlier was the number of parts that you were applying for PMA?

A Yes.

Q The number of applications you really can't estimate; is that right?

A Correct.

Q Now, on this original group of 10 to 50 parts which you applied for PMA sometime in 1977, did Execuair receive PMA?

A No.

Q Do you recall why they did not receive PMA on these initial applications?

A I don't recall specifically, but I believe I had done something wrong.

Q Where did you get the idea you had done something wrong?

A From the FAA.

Q Someone at the FAA told you you had done something wrong?

A I don't know whether it was procedural or what.

Q Do you recall who at the FAA told you that you had done something wrong?

A No.

Q Do you recall the names of any of the people you dealt with at the FAA in 1977?

A I only spoke with, I think it was Hank Kulwitz, K-u-l -- I am not sure how you spell it. I don't remember if I spoke with anyone else down there or not.

Q Kulwitz is as best as you can recall, something like that?

A Yes. I am pretty sure that is what it was, Kulwitz.

Q How about a person named Martell. Does that ring a bell?

A No.

Q How about a person named Beard. Does that ring a bell?

A Yes.

Q Kulwitz and Beard are two people you dealt with at the FAA in 1977?

A Kulwitz you asked me if it did ring a bell. He was, I will say the head. I don't know what else to call him.

Q So you didn't have any direct communications with Mr. Beard?

A Not that I recall.

Q So Kulwitz was the one you recall dealing with at the FAA?

A Yes.

Q Now, you mentioned that the Execuair initial applications for PMA were rejected, but you don't recall the speciic reasons; is that accurate?

A Yes.

Q Do you recall even generally what the problem was with this initial FAA-PMA application?

A No, I don't.

Q No recollection at all?

A No. I don't even think I was there when they came back.

Q Who, if anyone, at Execuair knows what the defect or defects were in the initial application?

A I believe Mr. Larry Manhan.

Q Did the FAA delay a while before getting back to you with a response on these applications?

A I don't remember.

Q You don't remember either way?

A I don't.

Q But at some point after you sent in the applications you got a response from the FAA; is that right?

A Yes, I believe so.

Q And you recall it was a rejection of all of the applications; is that correct?

A Yes.

Q And it was some defect either in the applications or in the procedure. It was really your fault?

A I believe so.

Q But you don't recall the specific defect?

A No.

Q Do you recall how much delay there was in ultimately getting PMA as a result of that technical defect in the first set of applications?

A I don't understand the question.

Q Let me see if I can do it in two or three questions. You submitted a series of drawings for PMA approval; is that right?

A Yes.

Q And it took the FAA a certain period of time to respond to those submissions; is that right?

A Yes.

Q Do you recall how long it took before they responded?

A No, I don't.

Q Did they respond immediately?

A I don't recall.

Q You have no recollection either way?

A No. I said before I don't think I was there when they came back.

Q So at some point in time the FAA responded by rejecting these initial applications for PMA: is that right?

A Yes.

Q That was due to technical defects in the PMA applications: is that correct?

MR. COLLINS: As of what time frame?

Q BY MR. FAIRBANK: As of today. Is there today a head of quality assurance?

A No.

Q Has there at any point to the best of your recollection been a person whose job is quality assurance?

A Yes.

Q At what point?

A Way back in the mid-'70s, maybe prior.

Q Mid-'70s or earlier?

A Probably.

Q At some point that job was eliminated?

A Yes.

Q Do you recall about when the quality assurance job was eliminated?

A No, I don't.

Q Sometime around '75?

A Possibly.

Q Is that your best recollection?

A That is the best guess I have.

Q Who was the head of quality assurance in the early 1970s?

A I think that was Sal, the Sal you mentioned.

Q A person named Sal?

A I believe so.

Q Do you remember his last name?

A No, I don't.

Q We will put a blank for Sal. If you remember his last name later will you fill it in?

A Okay.

(Information Requested:__________________________________.)

Q BY MR. FAIRBANK: There is a square called Engr. Do you know what that means?

A I assume engineering.

Q Was there anybody that was the head of engineering at any point in the last 10 years?

A No. Nobody other than Mr. Manhan.

Q There is a box that says Acc't & Payroll. Do you know what that is?

A That would be accounting and payroll would be like Vince.

Q What is Vince's last name, Yarans?

A Yarans.

Q That was over the whole last 10-year period?

A I don't know. I don't think he has been there 10 years.

Q This is the one that has been there four years or five years?

A I believe a couple, three years. I honestly don't recall.

Q Do you know who his predecessor was in accounting and payroll?

A No, I don't.

Q How about sales? Who was the person that was head of sales?

A It would be David.

--

Q David Manhan?

A Yes.

Q That would be for the whole period that he has been with Execuair?

A I believe so.

Q And you don't recall when he started?

A No, I don't.

Q Do you remember who was the head of sales before David Manhan joined Execuair?

A I believe Larry.

Q Larry Manhan?

A Larry Manhan.

Q How about material control. Do you recall anybody that had that title?

A No.

Q Do you know what material control is?

A I think it just is as it says here. It is shipping and receiving and I don't think there has ever been a person for the box.

Q You worked for a while in shipping and receiving?

A Yes.

Q Would you have been a head of material control or you didn't have that title?

A I didn't have a title.

Q But this is the area that we are talking about, shipping and receiving?

A Right.

Q The warehouse department?

A Warehouse.

Q You worked in the early '70s in that area?

A Yes.

Q Then you shifted ultimately to general manager?

A Ultimately, yes.

Q In the right-hand side of this organization chart under the companies Execuair Corp., Titan Pump, EMC Manufacturing, it has in parentheses manufacturing services. Does that mean that Execuair Corp., Titan Pump and EMC Manufacturing are all companies who manufacture products?

A I don't think so.

Q What do you think is meant by that? Do you know?

A I would think that is manufacturing services applied to the EMC.

Q And Titan Pump also manufacturing that; is that right?

A Yes.

Q But Execuair Corp. does not manufacture; is that correct?

A They do now.

Q And they manufacture the PMA parts?

A Yes. I thought that is where we still were. You were going to ask me a list of questions referring to this, and so you then didn't have to provide it with a long lengthy thing.

Q Then I got back into personnel again.

A I am sorry.

Q Pardon me. But Execuair Corp. is only related to the PMA parts?

A Yes.

Q Today at least?

A Yes.

Q So all three of these entities, Execuair, Titan Pump, and EMC Manufacturing, they all manufacture one or more products today; is that right?

A Today, yes.

Q What again does EMC manufacture?

A EMC does the manufacturing for Titan Pump.

Q So those two are related?

A I believe that they do the manufacturing for Titan Pump. I think it is internal paperwork.

Q Who is the person in the position called manufacturing operations?

A I don't know.

Q You don't know at any point in time?

A I don't know at any point in time.

Q How about production control?

A Again, I don't know.

Q How about the position called shop? No names?

A Nothing.

Q How about the position called stores?

A No.

Q How about the purchasing department?

A Purchasing would be Larry Manhan and myself and David.

V

OCT 31 11 29 AM '77
DISTRICT COURT
DIST. OF CALIF

FILED

NOV 1 - 1977

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY ________ DEPUTY

JOHN A. CALFAS
M. YANCE HIRSCHI
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213-828-5545

ROBERT E. COOPER
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515 South Flower Street
Los Angeles, California 90071
213-488-7000

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

4

WHITTAKER CORPORATION and
DYNASCIENCES CORPORATION,

Plaintiffs,

vs.

EXECUAIR CORPORATION, EMC
MANUFACTURING CO., INC.,
and LAURENCE S. MANHAN,

Defendants.

CIVIL ACTION NO. 77-3261-MML

PRELIMINARY INJUNCTION

WHEREAS, plaintiffs, Whittaker Corporation and Dynasciences Corporation, filed an application for a preliminary injunction in the above-entitled action on August 30, 1977; and

WHEREAS, defendants, Execuair Corporation, EMC Manufacturing Co., Inc. and Laurence S. Manhan, filed an opposition to plaintiffs' application for preliminary injunction on September 26, 1977; and

WHEREAS, hearings on plaintiffs' application were held on October 3, 1977 and on October 17, 1977; and

WHEREAS, the parties have stipulated that the following preliminary injunction may issue:

IT IS THEREFORE ORDERED that the defendants, their agents

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servants, employees, attorneys and all persons in active concert and participation with them (herein "defendants") be, and they hereby are, restrained and enjoined, pending the determination of this action, from:

1. Selling any Whittaker or Dynasciences valve, or subassembly or part thereof, which has been rebuilt or modified by or on behalf of defendants, unless said valve, subassembly or part, and all documents provided to the purchaser describing the product (including but not limited to quotations, invoices, shipping documents and materials, acknowledgements and certifications) are prominently and legibly labelled in letters at least 2.5 millimeter high, with the legend "REBUILT BY EXECUAIR AND NOT BY WHITTAKER" (herein "full-size label"). The full-size label shall be affixed to all Whittaker or Dynasciences valves on which said full-size label will fit, including but not limited to, the 2-1/8" Motor-Operated Butterfly Valve. A reduced-size label shall be affixed to any valves which do not have a surface area sufficient to accommodate such a full-size label; said reduced-size label shall be of the largest possible dimensions and lettering consistent with its application to the Whittaker or Dynasciences valve sold by defendants which has been rebuilt or modified by or for or on behalf of defendants with the smallest available surface area. With respect to any subassembly or part, if the surface area of the subassembly or part is insufficient to accommodate a label or if the nature of the subassembly or part is such that the user would have to remove the label before installation, the legend may be applied either by tag attached to said subassembly or part or by tag or label placed in or on the container in which each

subassembly or part is individually packaged, except that, with respect to low cost, small parts which are substantially smaller and less expensive than motor end plates for the 2-1/8" Motor-Operated Butterfly Valve and which are packaged together, said tag or label may be placed in or on said package.

2. Selling any Whittaker or Dynasciences valve or subassembly thereof, which has been built, rebuilt or modified by or on behalf of defendants, using any subassembly or part manufactured by or for defendants, unless said valve or subassembly, and all documents provided to the purchaser describing the product (including, but not limited to, quotations, invoices, shipping documents and materials, acknowledgements and certifications) are prominently and legibly labelled in letters at least 2.5 millimeters high with the legend "BUILT, REBUILT OR MODIFIED BY EXECUAIR AND NOT BY WHITTAKER, USING PARTS MANUFACTURED BY OR FOR EXECUAIR AND NOT BY OR FOR WHITTAKER" (herein "full-size label"). The full-size label shall be affixed to all Whittaker or Dynasciences valves on which said full-size label will fit, including but not limited to, the 2-1/8" Motor-Operated Butterfly Valve. A reduced-size label shall be affixed to any valves which do not have a surface area sufficient to accommodate such a full-size label; said reduced-size label shall be of the largest possible dimensions and lettering consistent with its application to the Whittaker or Dynasciences valve sold by defendants which has been rebuilt or modified by or for or on behalf of defendants with the smallest available surface area. With respect to any subassembly, if the surface area of the subassembly is insufficient to accommodate a label or if the nature of the subassembly is such that the

user would have to remove the label before installation, the legen may be applied either by tag attached to said subassembly or by tag or label placed in or on the container in which each subassembly is individually packaged.

3. Selling any part for a Whittaker valve which has been manufactured by or for Execuair, unless said part and all documents provided to the purchaser describing the product (including but not limited to quotations, invoices, shipping documents and materials, acknowledgements and certifications) are prominently and legibly labelled in letters at least 2.5 millimeters high, with the legend "MANUFACTURED BY OR FOR EXECUAIR AND NOT BY WHITTAKER". If the surface area of the part is insufficient to accommodate a label or if the nature of the part is such that the user would have to remove the label before installation, the legend may be applied either by tag attached to said part or by tag or label placed in or on the container in which each part is individually packaged, except that, with respect to low cost, small parts which are substantially smaller and less expensive than motor end plates for the 2-1/8" Motor-Operated Butterfly Valve and which are packaged together, said tag or label may be placed in or on said package.

4. Advertising for sale any Whittaker valve, subassembly or part thereof, unless all advertising and other promotional materials (including, but not limited to, parts lists, price lists and data sheets) distributed or made available to prospective purchasers bear the following legend prominently and legibly displayed in letters at least 2.5 millimeters high: "WHITTAKER VALVES OR PARTS SUPPLIED BY EXECUAIR ARE BUILT, REBUILT, OR MODIFIED BY EXECUAIR, AND MAY CONTAIN PARTS MANUFACTURED BY OR

FOR EXECUAIR AND NOT BY OR FOR WHITTAKER", provided that Execuair may omit the above legend in any advertising which relates solely to any Whittaker valves which are new, unused surplus, and have not in any way been rebuilt or modified by Execuair, and further provided that Execuair does not employ any such advertising to create the impression that Execuair supplies only new, unused surplus Whittaker valves.

5. Defendants shall advise each customer from which defendants have received an order for Whittaker valves, subassemblies or parts thereof, which order had not been filled by complete shipment by August 29, 1977, and which order will or has been filled by (i)valves or subassemblies containing parts manufactured by or for defendants, or (ii)parts manufactured by or for defendants, that the valve or subassembly contains parts manufactured by or for Execuair and not by or for Whittaker, or that parts were manufactured by or for Execuair, and not by or for Whittaker. Such advice shall be in writing and shall be mailed to the customer to the attention of the buyer or purchasing agent who placed such order.

IT IS FURTHER ORDERED that this preliminary injunction is in addition to, and does not supersede, the injunction issued on or about July 2, 1968, as part of the final judgment in Whittaker Corporation vs. Execuair Corporation and Laurence S. Manhan, Civil Action No. 67-1027-AAH, United States District Court, Central District of California.

IT IS FURTHER ORDERED that defendants file with the Court and serve on plaintiffs, within 30 days after entry of this injunction, a statement under oath that they have complied with this injunction, specifying the actions taken by defendants to effect compliance, and attaching samples of each type of documentation used in that regard.

IT IS FURTHER ORDERED that plaintiff Whittaker Corporation post bond in the amount of $10,000.00 prior to issuing of this injunction.

This preliminary injunction shall remain in effect until further Order of this Court.

IT IS SO ORDERED THIS 1st DAY OF November, 1977.

United States District Judge

SO STIPULATED

JESSUP & BEECHER

BY Warren Jessup Oct 26, 1977
Warren T. Jessup Date
Attorneys for Defendants

John A. Calfas
M. Yance Hirschi
CALFAS & WILLIAMS

By 10/28/77
John A. Calfas Date
Attorneys for Plaintiffs

Robert E. Cooper
James P. Clark
GIBSON, DUNN & CRUTCHER

By James P. Clark 10/26/77
James P. Clark Date
Attorneys for Plaintiffs

ATTENTION: MR. KEN BLACK, AVIATION SPECIALIST

Reference our telecon of December 12 between L. S. Manhan, President of Execuair, and Ken Black. Our problem is Execuair is attempting to become FAA/PMA certified by the FAA under 21.303.8A(3) and part B of the same section. Execuair has been in business 21 years selling and servicing aircraft items on a world-wide basis. Since October 1970 we have been an FAA approved repair station specializing in Whittaker hydraulic, pneumatic, and fuel valves as well as our own manufactured fuel pumps and vacuum pumps. During this time we experienced no AD notes on complete units or AD notes on component parts. We are also considered a prime supplier to the Air Force at Tinker Air Force Base, Oklahoma City, and Kelly Air Force Base, San Antonio, Texas. We also supply material to McClellan Air Force Base and to the Marine Corps and DSA in Richmond, Virginia.

Late September we started discussions with the FAA regarding the FAA/PMA. We have had several meetings with them, both at our facility and at their facility. October 5th was the first transmittal of data to the FAA. The gentlemen assigned to our project is a Mr. Hank Kulewicz. Additional letters were sent October 14th, 18th, 24th, November 7th, 11th, December 7th, and 8th. I visited the FAA on November 3rd, 4th, and December 4th to bring documents and to discuss with Mr. Kulewicz the ongoing problem. I talked to Mr. Kulewicz at least once a week to find out how we were progressing.

I was not able to obtain a firm committment but after contacting your office in Woodland Hills they contacted the FAA on Friday the 9th of December and was advised that the FAA was sending me a letter that day. The letter was received in this morning's mail. The letter tells us that a review of drawings submitted indicates that though the identicalness requirement is met and that was the basis on which we submitted our FAA/PMA request, they are asking for additional documentation that is not available at our facility nor is the documentation even on file with the FAA. We are going to continue to manufacture the parts in accordance with the prints submitted. The application would remain the same and the end application of the unit remaining constant with the original design. The adherence to the FIS inspection system laid down by the FAA is only an added safeguard as we basically subscribe to the military MIL 45208A inspection system.

[illegible] REMMET AVENUE · P. O. BOX 1188 · CANOGA PARK, CALIFORNIA 91304, U. S. A. · (213) 341-0010
TELEX 6-74264 · CABLE EXECUAIR-CANOGA PARK

This delay has created the following problem, we have had to lay off 11 people which represents 50 per cent reduction in staff and has put my SBA loan in serious jeopardy which was $175,000 and is now paid down to $96,000. Just a footnote, the SBA just recently restructured the loan from a payback of $2400 a month to $1300 a month because of this problem. Our current accounts receivable is now in serious question and our backlog is unfillable to the commercial airlines because the FAA engineering does not accept FAA Repair Station information which is a counterpart of the FAA. This is making the problem even more compounded. We accept the responsibility of what we do as an FAA shop but the FAA engineering does not consider an FAA approved Repair Station valid background.

Should you require any additional data please do not hesitate to contact the undersigned at 800-423-5177 or 213-341-0010 or my home 213-888-1419.

Sincerely yours,

[illegible]. S. Manhan
President

FROM: DEPARTMENT OF THE AIR FORCE
Headquarters San Antonio Air Logistics Center (AFLC)
Kelly Air Force Base, Texas 78241

REPLY TO ATTN OF: L. MARRS/PMXPE/925-8777/mb

23 JUL 1982

SUBJECT: Solicitation No. FD2050-82-79200

TO: WHITTAKER CONTROLS INC.
12838 SATICOY STREET
NORTH HOLLYWOOD CA 91605

1. There were 2 prospective contractors solicited and 2 proposals were received.

2. Award was made to:

CONTRACTOR	ITEM NO.	QUANTITY	UNIT PRICE
EXECUAIR 8749 REMMET AVENUE PO BOX 1166 CANOGA PARK CA 91304	0001	351 EA	$20.00

3. Additional information may be requested from the Contracting Officer.

Shirley A. Martinez
Contracting Officer
Directorate of Contracting & Mfg

RECEIVED
JUL 30 1982

HEADQUARTERS SAN ANTONIO AIR LOGISTICS CENTER (AFLC)
KELLY AIR FORCE BASE, TEXAS 78241

JUL 3 1 1981

PMDOX

Rejection of Initial Items on Contracts F41608-81-C-A254, F41608-81-C-A353, F41608-81-C-A537

Universal Aircraft Parts Inc
Attn: Mr Irv Friedman, President
P O Box 819
Hialeah FL 33011

1. The Initial Items submitted to the Government on the subject contracts are unacceptable.

a. The ring seals, NSN 2995-00-588-9750RX, P/N 124232, on contract F41608-81-C-A254 are undersized with poor concentricity between I.D. and O.D. and do not meet drawing requirements.

b. The fuel cams, NSN 2915-00-352-3984, P/N 152537, on contract F41608-81-C-A353, do not meet the thickness requirements.

c. The shaft valve, NSN 2915-00-546-7980, P/N 132002, on contract F41608-81-C-A537, does not meet the length requirement. ✓

2. Contact point is SA-ALC/PMDOX/Carmen Classy/AV 945-4871/AC 512, 925-4871.

George E. McFerren
GEORGE E. MCFERREN
Contracting Officer
Directorate of Contracting and
Manufacturing

Cy to: DCASMA Orlando/DCRA-GOC
3555 Maguire Blvd
Orlando FL 32803

AFLC - Lifeline of the Aerospace Team

DEFENDANT'S
EXHIBIT NO. E
FOR IDENTIFICATION
1-25-82 ST
DATE RPTR.

Universal Aircraft Parts, Inc.

MAILING ADDRESS
P.O BOX 219
HIALEAH FLORIDA 33011

WAREHOUSE
125 WEST 22nd STREET
HIALEAH FLORIDA 33010
305-887-8201

TELEX NO. 51-5748

August 18th, 1981

Execuair Corporation
P.O. Box 1166
Canoga Park, California 91304

Attn: Larry

Dear Larry,

I have just returned from a 2 week vacation and have been inundated with problems resultant from rejections by the Military on materials you are shipping to us. I think at this time we had best take stock as to what is happening and advise you accordingly.

We have been dealing with the Military for many years, our rejections have been very few. In those instances we have found the Military to be generally correct and we are leaning in that direction as far as materials we are receiving from you are concerned.

You are quoting us New Surplus, of original Whittaker manufacture, on materials that are possibly being manufactured by sources other than Whittaker. In effect if the parts you are shipping us are of original Whittaker manufacture, why are we having rejections due to demensional problems, workmanship and etc. Your statement on the bottom of your invoice concerns and puzzles us. "Manufactured by or for Execuair and not by Whittaker". Just recently we had the order reactivated on P/N 100190-3 pins after numerous discussions with the Military reiterating to them the quality of the material we would provide, based on information you provided me with. They finally agreed to inspect them and you now advise me the only quantity you have which happened to be the quantity that we returned, are lost.

Now, how do you propose that we get out of this mess we are in? We are being charged against "Goverment Default clause" and could possibly be removed from the active bidders list, due to the number of rejections now charged against us.

- TO BE CONTINUED NEXT PAGE -

Universal Aircraft Parts, Inc.

MAILING ADDRESS
P O BOX [illegible]
HIALEAH FLORIDA 33011

WAREHOUSE
125 WEST 22nd STREET
HIALEAH FLORIDA 33010
[illegible]

TELEX NO 51-5746

We know for a fact that these rejected materials will be purchased from Whittaker with us paying the difference between what we quoted the Military and the prices that Whittaker will now charge them for these same items. The loss will be substancial to us for no fault of our own.

I thank at this time that it would be best to again advise you that when you quote us in the future, we are only interested in New Surplus material that you have in stock manufactured only by Whittaker. At times the Military will condiser F.A.A.-O.H.C. material. If this is the case it will be spelled out on our P.O.

Please do not ship anything other than what we specifically ask for. Your legal suite with Whittaker is not of our concern and the Military is now so annoyed at us, that to send them copies of what you sent us would only aggravate the situation.

Very truly yours,
UNIVERSAL AIRCRAFT PARTS, INC.

Irv Friedman
President

IF/mi

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached { is a true copy / [illegible] } of the original

91WE Execuair Corporation File

[illegible] the Aircraft Engineering Division, Aircraft Engineering District
[illegible] 43, Van Nuys, California.

Signed and dated at Hawthorne, California

this 24th day of September, 1980

by FJKarnowski
F. J. KARNOWSKI
Assistant Chief, Aircraft Engineering Division
(Title)

* * *

I HEREBY CERTIFY that F. J. KARNOWSKI

[illegible] signed [illegible] oregoing certificate is now, and was, at the time of signing
ASSISTANT CHIEF, AIRCRAFT ENGINEERING DIVISION
FAA WESTERN REGION

[illegible] at full [illegible] and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Department of Transportation to be affixed this 24th day of Sept., 1980

at

(Signature)

Chief, Personnel Mgt. Div.
(Title)

Department of Transportation

Form DOT F 2100.1 (9-69)

FAA AC 70-3440

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 10

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	FAA Sealed Execuair Drawings	Whittaker Valve No.	
E-141040	141040	E-141040-NC	141005, 141015	Convair 440
E-140917	140917	E-140917-NC	141005, 141015	Convair 440
E-143889	143889	E-143889-A	146905	DC-8
E-WA760-3	WA060-3	E-WA760-3-E	130345-1	Fairchild FH-227
E-WE459-1½D-3	WE459-1½D-3	E-WE459-1½D-3-H	130345, 130345-1	Fairchild FH-227
E-WE459-1½D-4	WE459-1½D-4	E-WE459-1½D-4-G	130345, 130345-1	Fairchild FH-227
E-105567	105567	E-105567-N/C	150055, 150095 151395	P&W JT-4D
E-105561	105561	E-105561-A	150055, 150095, 151395	P&W JT-4D
E-105562	105562	E-105562-B	150055, 150095, 151395	P&W JT-4D
E-105570	105570	E-105570-N/C	160055, 150095, 151395	P&W JT-4D

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 10

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	FAA Sealed Execuair Drawings	Whittaker Valve No.	
E-105568	105568	E-105568-B	150055, 150095, 151395	P&W JT-4D
E-105569	105569	E-105569-B	150055, 150095, 151395	P&W JT-4D
Body Assembly P/N E-221468	221408	E-221408-B	129525	Pratt & Whitney JT8D-1 -1A, -1B, -7, -7B, -9, -9A, -11, -15, -17 when used on Douglas DC-9 and Boeing 727, 737

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch

July 11, 1980

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6377:7/11/80
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 9

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number	Design Data and Approval Means	Eligible for Installation on
Titan Fuel Pump P/N 4101-B-68 Type G6	Aircraft Specification 1A3 and Bellance licensing agreement letter dated June 7, 1979	Bellanca Models 17-31 (S/N 32-1 thru 32-14) and 17-31TC (S/N 31001 thru S/N 31003).
Tital Fuel Pump P/N 4101-B-69 Type G6	T.C. Data Sheet A18CE and Bellanca licensing agreement letter dated June 7, 1979	Bellanca Models 17-31A (S/N 32-15 thru 32-163) and 17-31ATC (S/N 31004 thru 31130)

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch

October 1, 1979

cc: WE-AEDO-43

EEPorter:lgkAWE-180:x6377:10/1/79
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 8

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA Sealed Execuair Drawings	Whittaker Valve No.	
P/N E-111022	111022	E111022 Rev. A	124645 and 129485	Boeing 707, 720, McDonnell Douglas DC-8
P/N E-111028	111028	E111028 Rev. N/C	124645 and 129485	McDonnell Douglas DC-8, Boeing 707, 720
P/N E-155069	155069	E155069 Rev. A	124645 and 129465	McDonnell Douglas DC-8, Boeing 707, 720
P/N E-155148	155148	E155148 Rev. N/C	124645 and 129485	McDonnell Douglas DC-8, Boeing 707, 720

*or later FAA sealed revisions

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch
June 12, 1979

cc: WE-AEDO-43
EEPorter:lkg:AWE-180:x6377:6/12/79
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 7

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA Sealed Execuair Drawings	Whittaker Valve No.	
P/N E-121791	P/N 121791	E-121791 Rev. N/C	P/N 120965	McDonnell Douglas DC-8
P/N E-111020	P/N 111020	E-111020 Rev. B	P/N 124645	Boeing 707
P/N E-126352	P/N 126352	E-126352 Rev. N/C	P/N 129525	McDonnell Douglas DC-9 Boeing 727, 737
P/N E-125842	P/N 125842	E-125842 Rev. D	P/N 124645	Boeing 707
The parts listed above have drawing change letter revisions that supersede those shown on Supplements No. 2 and 4				
P/N E-151261-1, -2, and -3**	P/N 151261	E-151261 Rev. E	P/N 129525	McDonnell Douglas DC-9 Series Boeing 727 and 737 Series

*or later FAA sealed revisions
** adds -1, -2, and -3, was basic number in Supplement No. 1

Original Signed By
C. C. RISNER
C. C. RISNER
Chief, Manufacturing Inspection Branch

May 22, 1979

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6377:5/23/79
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 6

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-117519	117519	E-117519 Rev. D	123855	McDonnell Douglas DC-8, Boeing 707 and 720
E-105368	105368	E-105368 Rev. N/C	123855	McDonnell Douglas DC-8, Boeing 707 and 720
E-131882	131882	E-131882 Rev. B	131955, -1, -2	Boeing 707 and 720
E-121580	121580	E-121580 Rev. B	121055	McDonnell Douglas DC-8
E-121617	121617	E-121617 Rev. B	121055	McDonnell Douglas DC-8
E-119361	119361	E-119361 Rev. E	131805, -1	Convair 880 and 990
E-119360	119360	E-119360 Rev. N/C	131805, -1	Convair 880 and 990
E-132367	132367	E-132367 Rev. N/C	131805,-1	Convair 880 and 990

*or later FAA sealed revisions

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 6

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Exeduair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-121567	121567	E-121567 Rev. C	120885	McDonnell Douglas DC-8
E-121538	121538	E-121538 Rev. G	120885	McDonnell Douglas DC-8
E-121550	121550	E-121550 Rev. A	120885	McDonnell Douglas DC-8
E-121569	121569	E-121569 Rev. B	120885	McDonnell Douglas DC-8
E-121560	121560	E-121560 Rev. A	120885	McDonnell Douglas DC-8
E-121562	121562	E-121562 Rev. B	120885	McDonnell Douglas DC-8
E-121572	121572	E-121572 Rev. B	120885	McDonnell Douglas DC-8
E-122120	122120	E-122120 Rev. B	120885	McDonnell Douglas DC-8
E-121568	121568	E-121568 Rev. A	120885	McDonnell Douglas DC-8

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 6

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execualr Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execualr are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execualr Valve Components	Whittaker Controls Valve Components	*FAA sealed Execualr Drawings	Whittaker Valve No.	
E-134217	134217	E-134217 Rev. N/C	136555	McDonnell Douglas DC-8

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch

January 24, 1979

cc: WE-AEDO-43

WEyre:lkg:AWE-180:.x6377:1/24/79
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 5

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number	Design Data and Approval Means	Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls		Refer to Whittaker valve no. and aircraft models for eligibility

Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-154368-1,-2	154368	E-154368 Rev. C	129525	Boeing 727, 737 McDonnell Douglas DC-9
E-154560-1,-2,-3	154560	E-154560 Rev. D	129475	Boeing 727, 737 McDonnell Douglas DC-9
E-150562-1	150562	E-150562 Rev. A	124645	Pratt & Whitney JT3D Series

*or later FAA sealed revisions

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch

December 5, 1978

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 4

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-141881	141881	E-141881 Rev. A	143395-1, -2	McDonnell Douglas DC-8
E-141882	141882	E-141882 Rev. N/C	143395-1, -2	McDonnell Douglas DC-8
E-121789	121789	E-121789 Rev. A	120965	McDonnell Douglas DC-8
E-121791	121791	E-121791 Rev. A	120965	McDonnell Douglas DC-8
E-132348	132348	E-132348 Rev. C	139525	McDonnell Douglas DC-10
E-122001	122001	E-122001 Rev. C	121125-1, -2 and 124235	McDonnell Douglas DC-8
E-122022	122022	E-122022 Rev. D	121125-1, -2 and 124235	McDonnell Douglas DC-8
E-122719	122719	E-122719 Rev. D	121125-1, -2 and 124235	McDonnell Douglas DC-8

*or later FAA sealed revisions

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 4

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-151569	151569	E-151569 Rev. N/C	120565-1	McDonnell Douglas DC-8
E-116457	116457	E-116457 Rev. D	130585 and 138105	Boeing 707 and 720
E-130787	130787	E-130787 Rev. C	130595	Boeing 707, 720,727, and 737
E-143730	143730	E-143730 Rev. C	146505-15	Boeing 707, 720 McDonnell Douglas DC-8 and DC-9
E-144329	144329	E-144329 Rev. B	147425-1, -2	McDonnell Douglas DC-9
E-144327	144327	E-144327 Rev. N/C	147425-1, -2	McDonnell Douglas DC-9

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 3

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA Sealed Execuair Drawings	Whittaker Valve No.	
E-151262	151262	E-151262 Rev. A	129525	McDonnell Douglas DC-9 Boeing 727, 737
E-151698	151698	E-151698 Rev. F	129475	McDonnell Douglas DC-9 Boeing 727, 737
E-152662	152662	E-152662 Rev. N/C	129475	McDonnell Douglas DC-9 Boeing 727, 737
E-154560	154560	E-154560 Rev. D	129475	McDonnell Douglas DC-9 Boeing 727, 737
E-3068	3068	E-3068 Rev. D	140915-1	Boeing 707
E-3068	3068	E-3068 Rev. D	140925-1	Boeing 720
E-121482	121482	E-121482 Rev. C	123605-1	McDonnell Douglas DC-8

*or later FAA sealed revisions

PRODUCTION APPROVAL LISTING - SUPPEEMENT NO. 3

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	FAA Sealed Execuair Drawings	Whittaker Valve No.	
E-122140	122140	E-122140 Rev. A	123605-1	McDonnell Douglas DC-8
E-WE442-2½D21	WE442-2½D21	E-WE442-2½D21 Rev. A	124645	Pratt and Whitney JT3D Series
E-109498	109498	E-109498 Rev. A	124645	Pratt and Whitney JT3D Series
E-150562	150562	E-150562 Rev. A	124645	Pratt and Whitney JT3D Series

Original Signed By
C. C. RISNER

C. C. RISNER
Chief, Manufacturing Inspection Branch

October 26, 1978

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6377:10/26/78
PQ1091WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 4

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA sealed Execuair Drawings	Whittaker Valve No.	
E-100168	100168	E-100168 Rev. EA	All Whittaker valves that call out P/N 100168	All Aircraft

C. C. RISNER
Chief, Manufacturing Inspection Branch

November 20, 1978

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6377:11/20/78
PQ1090WE

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 2

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	*FAA Sealed Execuair Drawings	Whittaker Valve No.	
P/N E-121788	P/N 121788	E-121788 Rev. N/C	P/N 120965	McDonnell Douglas DC-8
P/N E-121782	P/N 121782	E-121782 Rev. N/C	P/N 120965	McDonnell Douglas DC-8
P/N E-121488	P/N 121488	E-121488 Rev. C	P/N 123605-1	McDonnell Douglas DC-8
P/N E-124150	P/N 124150	E-124150 Rev. N/C	P/N 123605-1	McDonnell Douglas DC-8
P/N E-153188	P/N 153188	E-153188 Rev. B	P/N 146505-15	McDonnell Douglas DC-8, DC-9 Boeing 707, 720
P/N E-143722	P/N 143722	E-143722 Rev. E	P/N 146505-15	McDonnell Douglas DC-8, DC-9 Boeing 707, 720
P/N E-143742	P/N 143742	E-143742 Rev. E	P/N 146505-15	McDonnell Douglas DC-8, DC-9 Boeing 707, 720
P/N E-143728	P/N 143728	E-143728 Rev. C	P/N 146505-15	McDonnell Douglas DC-8, DC-9 Boeing 707, 720
P/N E-143737	P/N 143737	E-143737 Rev. B	P/N 146505-15	McDonnell Douglas DC-8, DC-9 Boeing 707, 720
P/N E-150708	P/N 150708	E-150708 Rev. N/C	P/N 124645	Boeing 707

*or later FAA sealed revisions

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 2

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	FAA Sealed Execuair Drawings	Whittaker Valve No.	
P/N E-121642	P/N 121642	E-121642 Rev. A	P/N 124645	Boeing 707
P/N E-111162	P/N 111162	E-111162 Rev. C	P/N 124645	Boeing 707
P/N E-107887	P/N 107887	E-107887 Rev. N/C	P/N 124645	Boeing 707
P/N E-107889	P/N 107889	E-107889 Rev. C	P/N 124645	Boeing 707
P/N E-126030	P/N 126030	E-126030 Rev. A	P/N 124645	Boeing 707
P/N E-125842	P/N 125842	E-125842 Rev. N/C	P/N 124645	Boeing 707
P/N E-121462	P/N 121462	E-121462 Rev. F	P/N 124645	Boeing 707
P/N E-111021	P/N 111021	E-111021 Rev. N/C	P/N 124645	Boeing 707
P/N E-153348	P/N 153348	E-153348 Rev. A	P/N 124645	Boeing 707
P/N E-111027	P/N 111027	E-111027 Rev. B	P/N 124645	Boeing 707
P/N E-141220	P/N 141220	E-141220 Rev. A	P/N 140915-1 and 140925-1	Boeing 707
P/N E-141219	P/N 141219	E-141219 Rev. C	P/N 140915-1 and 140925-1	Boeing 707
P/N E-112688	P/N 112688	E-112688 Rev. C	P/N 130585 and 138105	Boeing 707, 720
P/N E-111709	P/N 111709	E-111709 Rev. F	P/N 130585 and 138105	Boeing 707, 720
P/N E-108510	P/N 108510	E-108510 Rev. N/C	P/N 130595	Boeing 707, 720, 727, 737

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 2

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

Part Name and Number		Design Data and Approval Means		Eligible for Installation on
The parts listed under Execuair are approved replacements for those listed under Whittaker Controls				Refer to Whittaker valve no. and aircraft models for eligibility
Execuair Valve Components	Whittaker Controls Valve Components	FAA Sealed Execuair Drawings	Whittaker Valve No.	
P/N E-130631	P/N 130631	E-130631 Rev. F	P/N 130595	Boeing 707, 720 727, 737
P/N E-111020	P/N 111020	E-111020 Rev. A	P/N 124645	Boeing 707
P/N E-105561	P/N 105561	E-105561 Rev. A	P/N 124645	Boeing 707
P/N E-105478	P/N 105478	E-105478 Rev. J	P/N 124645	Boeing 707
P/N E-143719	P/N 143719	E-143719 Rev. N/C	P/N 146505-15	McDonnell Douglas DC-9 Boeing 707, 720
P/N E-126352	P/N 126352	E-126352 Rev. C	P/N 129525	McDonnell Douglas DC-9 Boeing 727, 737
P/N E-126357	P/N 126357	E-126357 Rev. N/C	P/N 129525	McDonnell Douglas DC-9 Boeing 727, 737
P/N E-126358	P/N 126358	E-126358 Rev. A	P/N 129525	McDonnell Douglas DC-9 Boeing 727, 737

MICHAEL BRECA
Acting Chief, Manufacturing Inspection Branch

September 18, 1978

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6377:9/18/78
PQ1091WE

RIS: FS 8120-3

PRODUCTION PROJECT CONTROL

INSTRUCTIONS

NEW, MODIFIED, CANCELED, AND REOPENED PROJECTS – Submit in triplicate to regional office. Complete items 2–14, Regional Office will complete items 1 and 15 if new project, and return one copy to district office and one copy to Aeronautical Quality Assurance Field Office.

ANNUAL REPORT – Submit original and one copy to regional office by April 15 or when requested by regional office for preparing work program. Region to send copy to Aeronautical Quality Assurance Field Office.

1. PROJECT NUMBER
PQ1091WE

2. TYPE OF ACTION
- ☒ NEW PROJECT
- ☐ INACTIVE PROJECT
- ☐ MODIFIED PROJECT
- ☐ CANCELED PROJECT
- ☐ REOPENED PROJECT
- ☐ ANNUAL REPORT

3. DATE OF ACTION
5/26/78

4. MANUFACTURER

A. NAME
Execuair Corporation

B. MAILING ADDRESS (Number, street, city, state, and zip code)
8749 Remmet Avenue
Canoga Park, CA 91304

C. LOCATION OF MANUFACTURING FACILITIES IF DIFFERENT FROM ITEM "B" ABOVE

5. PRODUCTION BASIS
- ☐ TYPE CERTIFICATE ONLY
- ☐ PRODUCTION CERTIFICATE NO
- ☒ P.M.A.
- ☐ SUPPLIER
- ☐ TSO MANUFACTURER
- ☐ APPROVED INSPECTION SYSTEM
- ☐ OTHER (Indicate type)

6. PRODUCT, ARTICLE, OR SERVICE
Controls Valve

7. ESTIMATED NUMBER OF PRODUCTION EMPLOYEES		2
8. ESTIMATED NUMBER OF COMPANY INSPECTORS		1
9. NUMBER OF DESIGNATED MANUFACTURING INSPECTION REPRESENTATIVES		0
10. MILES FROM MANUFACTURING INSPECTOR'S HEADQUARTERS		8
11. FAA MAN-HOURS USED LAST FISCAL YEAR	MANUFACTURING INSPECTION	
	OTHER SEGMENTS	
12. ESTIMATED FAA MAN-HOURS REQUIRED NEXT FISCAL YEAR	MANUFACTURING INSPECTION	24
	OTHER SEGMENTS	

13. REMARKS

FAA-PMA letter and supplement #1, dated May 26,1978.

" #2. " 9/15/78
#3 10/26/78
#4 11/20/78
#5 12/5/78
#6 1/24/79
#7 5/22/79
#8 6/12/79
#9 " 10/1/79
#10 7/11/80

00037

14. SUBMITTED BY

OFFICE IDENT.	TITLE	SIGNATURE
WE-AEDO-43	Aviation Safety Insp./Mfg.	H. E. Martell H. E. Martell

15. REGIONAL OFFICE APPROVAL

DATE	TITLE	SIGNATURE
	Chief, Mfg. Insp. Br., AWE-180	C. C. FISHER

May 26, 1978

Execuair Corporation
8749 Remmet Avenue
Canoga Park, California 91304

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

The May 25, 1978, statement certifying that you have established at 8749 Remmet Avenue, Canoga Park, California, a fabrication inspection system that meets the requirements of FAR 21.303(h) is accepted. Accordingly, approval is hereby granted to produce the parts listed in the enclosed supplement in conformity with the approved design data and any changes subsequently approved.

You are reminded of the following provisions of the Federal Aviation Regulations that are applicable to this approval.

1. The fabrication inspection system, methods, procedures, and manufacturing facilities covered by this approval, including the quality control system and data used at the manufacturing facilities of your suppliers of parts or services, are subject to FAA inspections.

2. Parts or services furnished by suppliers located in a foreign country may not be used in production of any part listed in the enclosed supplement unless:

a. That part or service can and will be completely inspected at a domestic facility, or

b. The part or service is approved for import to the U.S. under the terms of a bilateral agreement in accordance with FAR 21, Subpart N, or

c. The location of the facility of the foreign supplier places no burden on the FAA in administering applicable airworthiness requirements.

3. Parts produced under the terms of this approval must be marked with the identification information required by FAR 45.15 and as specified in the approved design data for that part.

4. This approval is not transferable to another person or location. It will be withdrawn for any reason that would preclude its issuance.

5. THIS OFFICE must be notified within 10 days from the date the manufacturing facilities covered by this approval are relocated or expanded to include additional facilities at other locations.

6. The holder of a parts manufacturer approval must maintain his fabrication inspection system in continuous compliance with the requirements of FAR 21.303(h) and ensure that each completed part conforms with the approved design data and is safe for installation on type certificated products.

7. The holder of a parts manufacturer approval is eligible for the appointment of qualified individuals in his employ to represent the FAA as Designated Manufacturing Inspection Representatives (DMIR) for the purpose of issuing export airworthiness approvals for Class II and Class III products.

Original Signed By:
EUGENE E. PORTER
EUGENE E. PORTER
Acting Chief, Manufacturing Inspection Branch

Enclosure:
Production Approval Listing Supplement No. 1

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6361:5/26/78

PRODUCTION APPROVAL LISTING - SUPPLEMENT NO. 1

FEDERAL AVIATION ADMINISTRATION - PARTS MANUFACTURER APPROVAL

Execuair Corporation

The parts listed under Execuair are approved replacements for those listed under Whittaker Controls

Part Name and Number		Design Data and Approval Means	Eligible for Installation on
Execuair	Whittaker Controls	FAA Sealed Execuair Drawings	
Shaft P/N E-126377	P/N 126377	E-126377 Rev. A	McDonnell Douglas DC-9 Series, Boeing 727 and 737 Series when these Execuair replacement components are used in the Whittaker Controls Valve Assembly P/N 129525
Shaft P/N E-221851	P/N 221851	E-221851 Rev. E	
Shaft P/N E-151270	P/N 151270	E-151270 Rev. B	
Lug P/N E-102048	P/N 102048	E-102048 Rev. A	
Shaft P/N E-154368	P/N 154368	E-154368 Rev. C	
Gear Assy P/N E-152071	P/N 152071	E-152071 Rev. E	
Gear P/N E-152070	P/N 152070	E-152070 Rev. A	
Gear P/N E-152069	P/N 152069	E-152069 Rev. E	
Gear Assy P/N E-151040 P/N E-151040-2	P/N 151040, -2	E-151040, -2 Rev. F	
Gear P/N E-151027	P/N 151027	E-151027 Rev. C	
Gear P/N E-156609	P/N 156609	E-156609 Rev. N/C	
Gear P/N E-151008	P/N 151008	E-151008 Rev. E	
Retainer P/N E-126371	P/N 126371	E-126371 Rev. N/C	
Cap P/N E-126360	P/N 126360	E-126360 Rev. N/C	
Lug P/N E-109122-1	P/N 109122-1	E-109122-1 Rev. N/C	
Base Plate P/N E-151261	P/N 151261	E-151261 Rev. E	

Original Signed By:
EUGENE E. PORTER
EUGENE E. PORTER
Acting Chief, Manufacturing Inspection Branch

May 26, 1978

cc: WE-AEDO-43

EEPorter:lkg:AWE-180:x6361:5/26/78

~~00040~~

Aircraft Engineering Div.
Rec'd:

JUN 26 1979

Control:
Date Ans.
File Code:

EP

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ms. Andrea Sheridan Ordin
United States Attorney
1100 United States Court House
312 North Spring Street
Los Angeles, California 90012

Re: Execuair Corporation, Case No. WE-77-EE-61
Request for Suit to Assess Civil Penalty

Dear Ms. Ordin:

In accordance with the instructions contained in the United States Attorneys Manual, Title 9, Criminal Division, Section 9-76.100, captioned Federal Aviation Act, we are hereby referring the enclosed material which involves alleged violations of the Federal Aviation Act of 1958, as amended (72 Stat. 731; Public Law 726, 85th Congress), and pertinent regulations.

The facts in the instant case, as well as the particular regulations which we believe to have been violated, are summarized in the enclosed Statement of the Case and appear more fully in the enclosed Violation Report, prepared by our Reporting Inspector, together with its attachments. After consideration of the facts, it was decided that we should seek to assess a civil penalty in this case, and to effect a settlement thereof, under the authority of Section 901 of the Act, which creates a liability for a civil penalty not to exceed $1,000.00 for each violation of the type shown in our file and authorizes us to accept offers in compromise.

As the violator, who is doing business in Canoga Park, California, has declined to tender an acceptable offer in compromise, the matter is hereby submitted to your office with the request that you institute proceedings in the United States District Court under Section 903(b) of the Federal Aviation Act for the collection of an appropriate civil penalty, if you concur that a reasonable compromise offer is unobtainable.

This office is confident that a finding favorable to the Government would be reached in litigation concerning this matter, and we stand ready to assist you in the preparation and presentation of the case as you may direct.

We would appreciate being periodically informed of the status of this matter.

Sincerely,

Original Signed By

DEWITTE T. LAWSON, JR.
Regional Counsel

Enclosures

PLS. RETURN TO AWE-180 cc [illegible] -43 [illegible]

[illegible] 20 1977

Case No. WE-77-EE-61

H.M.

E.P. E.F.

F/M

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Execuair Corporation
8749 Remmet Avenue
Canoga Park, California 91304

Gentlemen:

We have received a report of investigation from which it appears that Execuair Corporation (Execuair), the holder of an FAA repair station certificate but not the holder of a Parts Manufacturing Approval (PMA) issued under Section 21.303 of the Federal Aviation Regulations, manufactured five valves, part numbers 129525 and 129525-10, and sold them to Ozark Airlines, Inc. as new valves. Ozark Airlines is an FAA certificated domestic air carrier. Execuair also affixed name plates to the valves identifying them as Whittaker Corporation valves. The valves were manufactured pursuant to Ozark purchase orders and shipped under Execuair Invoices No. 41844 dated June 20, 1974, No. 45744 dated April 6, 1976, No. 45745 dated April 6, 1976, No. 46694 dated December 6, 1976, and No. 46902 dated January 26, 1977.

Based on this information, it appears that Execuair Corporation violated Section 21.303(a) of the Federal Aviation Regulations and is subject to a civil penalty under Section 901(a) of the Federal Aviation Act of 1958, as amended, in an amount not to exceed $1,000.00 for each such violation.

Upon consideration of all the facts and circumstances contained in the report, including L. S. Manhan's, President of Execuair, letter of November 18, 1977 to the Federal Aviation Administration, we would be unwilling to settle this case for any sum less than $5,000.00. In order to give Execuair an opportunity to submit such an offer in compromise, we will take no further action for a period of fifteen (15) days subsequent to your receipt of this letter.

Sincerely,

Original signed by

DeWITTE T. LAWSON, JR.
Regional Counsel

Enclosure

cc:
AGC-28
WE-AEDO-4-0-43 VNY
AFS-584
AWE-250
AWE-22c
PD

RECEIVED
DEC 22 1977
AIR CARRIER BRANCH

~~00360~~

DEC 5 1977

AWE-180

Execuair Corporation, Investigative Report,
Case No. WE-77-EE-61

Chief, Aircraft Engineering Division, AWE-100

AWE-7

Ref: AWE-7.2 letter relative to civil case against Execuair Corporation dated September 6, 1977

This compliance enforcement investigation was initiated in response to the reference legal counsel letter.

The Aircraft Engineering District Office (AEDO) No. 43 enforcement investigative report discloses that Execuair Corporation (Execuair), located at 8749 Remmet Avenue, Canoga Park, California, manufactured replacement parts for sale for installation on certificated products without obtaining an FAA Parts Manufacturer Approval (PMA). This is contrary to the requirements of FAR 21.303(a). Refer to Section 8 of report for names of Execuair Corporation subsidiary companies.

The AEDO No. 43 investigation substantiates that Execuair produced and sold aircraft replacement valves to Ozark Airline on five (5) known dates for installation on certificated aircraft. The evidence obtained by the AEDO supports the fact that these aircraft valves were not produced pursuant to an FAA-PMA. The five aircraft valves sold on the commercial market without benefit of an FAA-PMA are identified below followed by the circumstances leading to this noncompliance of FAR 21.303(a).

Valve Part Number	Valve Serial Number
129525	4761
129525	4762
129525	6741
129525-10	1771
129525-10	12761

Note: Manufacture and sale of these listed valves is supported by Items of Proof #C-1, #C-2, #C-3 and #C-8.

CONCURRENCES
RTG. SYMBOL AWE-18
INITIALS/SIG.
DATE 12/2/77
RTG. SYMBOL AWE-18
INITIALS/SIG.
DATE 12/5
RTG. SYMBOL
INITIALS/SIG.
DATE
RTG. SYMBOL
INITIALS/SIG.
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INITIALS/SIG.
DATE

00362

FAA Form 1360-14 (7-67)

OFFICIAL FILE COPY

Based on the facts and evidence presented, it appears Execuair did sell the listed valves to Ozark Airlines. This is supported by Ozark Airline purchase order numbers listed in five (5) separate Execuair invoices which also identify the subject valves by part number and serial, reference item of proof #C-1. The Central Region Flight Standards District Office (CE-FSDO) No. 62, Berkly, Missouri, responsible for surveillance of Ozark Airlines assisted in this investigation by furnishing evidence, item of proof #C-2, that Execuair did send at least three (3) of the above listed valves to Ozark with Execuair Service Corporation Repair Station "serviceable parts" tags attached. In connection with this, the face of these tags were stamped "new", which is not consistent with repair station rules, because parts processed under a repair station certificate are only overhauled and/or repaired.

The Western Region General Aviation District Office (GADO) No. 1 which has certificate management over Execuair's repair station provided additional objective evidence in the form of company work orders, reference item of proof #C-3 that confirm these five valves were manufactured as "new" and were not overhauled units. This is further evidenced by the word "new" stamped in the "required service" and in the shop traveler poetions of the work orders.

The fact that these valves were newly manufactured and sold by Execuair is further established by the documented discussion between Mr. Bruce Stuart, General Aviation Maintenance Inspector, WE-GADO-1, and Mr. L.S. Manhan, President of Execuair Service Corporation, Reference item of proof #C-4 for FAA Form 1522, record of conference dated October 13, 1977. This discussion was subsequently supported by Mr. Manhan's own admission to the "new" status of parts in his company letter to WE-AEDO-43 dated November 18, 1977, Reference item of proof #C-8. These documents also make reference to Execuair use of Whittaker Corporation valve components and retention of the Whittaker identification.

The November 18, 1977 letter from Mr. Manhan was in response to the WE-AEDO-43 letter of investigation concerning this matter dated October 13, 1977, Reference item of proof #C-5. In this letter, Mr. Manhan confirms the information he gave Mr. Stuart cited in the preceding paragraph is factual and that the valves sent to Ozark Airlines were represented as new and were completely assembled by Execuair.

In a subsequent comment, Mr. Manhan indicates he has been informed that the subject valves either came from Whittaker (which his company understood has FAA/PMA) or came from the same suppliers who produce the parts for Whittaker pursuant to Whittaker's prints.

We concur with the WE-AEDO-43 conclusion that there is no evidence that these valves were used on a type certificated product or created an unairworthy condition. Our support in favor of legal enforcement action is predicated on the following:

a. An unapproved article was sold for installation on a type certificated product and its conformance to an approved type design is questionable.•

✓ b. Mr. L.S. Manhan, President of Execuair, has demonstrated a disregard for the requirements of FAR 21.303(a). This becomes evident based on FAA efforts to provide guidance relative to this regulation on two separate occasions which were apparently ignored, Reference Items of proof in #C-6. This disregard for regulations is contrary to the elements required as a prerequisite for administrative action in Order 1000.9B, paragraph 5.a.

In consideration of the foregoing, we have concluded that Execuair produced and sold replacement aircraft valves without first obtaining an FAA-PMA. The Execuair contention that new component parts of valves either came from a FAA-PMA holder or its supplier, does not negate the fact Execuair was the producer of the valves cited in this enforcement action, Reference Item of Proof #C-8.

Therefore, in accordance with the guidelines in Order 8030.7A, 1000.9B, and the civil penalty provisions of Section 901 of the FA Act of 1958, we recommend the maximum civil penalty be imposed against Execuair Corporation in the amount of $5,000.00 which reflects $1,000.00 for each of the five aircraft valves manufactured and sold in noncompliance with FAR 21.303(a).

Original Signed By
M. C. BEARD

M. C. BEARD

Enclosure

cc: AAC-200
AGS-30
WE-AEDO-43
AWE-180:BEPorter:ah:x6361:12/2/77

AIRCRAFT ENGINEERING DISTRICT OFFICE #43
7120 Hayvenhurst Avenue, Suite 4[illegible]
Van Nuys, California 91406

October 13, 1977

Execuair Corporation
8749 Remmet Avenue
Canoga Park, California 91304

Attention: Lawrence S. Manhan

Gentlemen:

This letter is to inform you that the Federal Aviation Administration is investigating matters wherein it appears that Execuair Service Corp./Execuair Corp. (Execuair) is producing replacement parts for sale for installation on type certificated products, without obtaining a Federal Aviation Administration-Parts Manufacturer Approval (FAA-PMA) for those parts, as required by Part 21, Section 21.303, Para. (a) of the Federal Aviation Regulations. (FAR 21.303(a))

Ozark Airlines on three known occasions requested, by purchase order from Execuair, Valve, Part Number 129525; and on two other known occasions, Valve Part Number 129525-10. Execuair invoices relating directly to the Ozark purchase order numbers show these orders were completed with the following valve part numbers (P/N) and serial numbers (S/N).

Valve	P/N	129525	S/N	6741	Ref.	Ozark P.O. 7259 dtd 5/24/74. Execuair Invoice #41844 dtd 6/20/74.
"	"	129525	"	4762	"	Ozark P.O. 32974 dtd 7/23/75. Execuair Invoice #45744 dtd 4/6/76.
"	"	129525	"	4761	"	Ozark P.O. 27705 dtd 10/17/75. Execuair Invoice #45745 dtd 4/6/76.
"	"	129525-10	"	12761	"	Ozark P.O. 5457 dtd 11/30/76. Execuair Invoice #46694 dtd 12/6/76.
"	"	129525-10	"	1771	"	Ozark P.O. 6275 dtd 1/20/77. Execuair Invoice #46902 dtd 1/26/77.

These valves were represented both as "NEW" and as having been returned to service by Execuair's repair station. Available information indicates that Execuair did not maintain or alter existing valves under the privileges of their repair station certificate, but produced new valves and sold them to Ozark Airlines, which is a non-compliance with FAR 21.303(a).

COORDINATION
RTG. SYMBOL
INITIALS/SIG.
DATE 10/13/7
RTG. SYMBOL
INITIALS/SIG.
DATE 10/13/7
RTG. SYMBOL
INITIALS/SIG.
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INITIALS/SIG.
DATE

The above is evidenced by Execuair Work Orders for each of the aforementioned valves wherein the word "NEW" has been entered in the "Required Service" entry block; and in the Shop Traveler Section of the Work Order it shows that the operations performed by Execuair were: "Obtain necessary parts and inspect"; "Assemble per T.O. Number", etc. However, the "Receiving Inspection" and the "Disassemble, clean and inspect per T.O. Number" blocks were not signed off, thus showing the valves were completely assembled at Execuair and no repair to existing valves were involved.

Further, during the October 6, 1977 telephone conversation between you and Mr. Bruce Stuart, FAA Aviation Safety Inspector (Gen.) regarding the aforementioned five work orders, it was revealed by you that the work orders showed exactly what work was done; that the technician obtained parts out of stock and assembled and tested the valves per a T.O. Number. During this process, a Whittaker name plate is installed on the valves and the valves were serial numbered for identification by the repair station.

If the facts as stated are correct, it appears that there may have been a violation of the above cited Federal Aviation Regulations. We would appreciate receiving any evidence or statement you might care to make regarding this matter by October 27, 1977. Any discussion or written statements furnished by you will be given consideration in our investigation. Should the investigation substantiate that a violation did or did not occur, you will be informed accordingly.

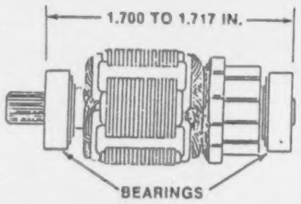
Sincerely,

[illegible]

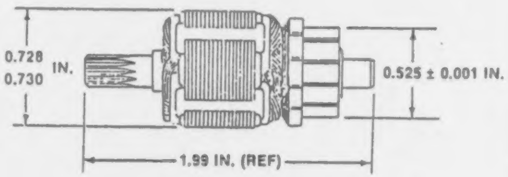
A. P. HOOVER
Chief, WE-AEDO-43

HEMartell:e:10/13/77

- CERTIFIED MAIL



154562 ARMATURE ASSEMBLY (any dash number) $35.00
153071 ARMATURE ASSEMBLY (any dash number) $37.50
151069 ARMATURE ASSEMBLY (any dash number) $36.00



154800-3 ARMATURE $20.00
156317-1 ARMATURE $22.50

Our FAA Repair Station has an approved repair to rewind your burned/shorted armature. The dollar savings is approx [illegible] 50%. The EXECUAIR 2[illegible] FLIGHT HOUR WARRA[illegible] applies. Turn around ti[illegible] days. All bearings used [illegible] assemblies are as [illegible]

EXECUAIR ADVERTISEMENT FOR REPAIRING
(PARTIALLY) AN ARMATURE WHICH GOES INTO
A WHITTAKER MOTOR-OPERATED VALVE.

UNAUTHORIZED BY WHITTAKER

APPENDIX B.—SUBMISSIONS OF EXECUAIR, INC., REFUTING COMMENTS OF WHITTAKER CONTROLS, INC., DATED AUGUST 17, 1982

NOVEMBER 1, 1982

The Honorable Andrew P. Ireland
Chairman, H.R. Subcommittee on [illegible]
  Opportunities and Special Sm[illegible]
  Business Problems
B363 Rayburn House Office [illegible]
Washington, D.C. 20515

Re: H.R. [illegible]

Dear [illegible]

[illegible] for [illegible] Opportunities [illegible] tion with its hearing on [illegible] its implementation by the Federal Aviation Adm[illegible] This statement is a response to the misleading statement dated August 18, 1982, submitted by Whittaker Controls.

If you or any member of the Subcommittee or staff have any questions regarding this statement, please contact me or Execuair's Los Angeles counsel, Harold R. Collins of Blecher & Collins (213) 625-0200.

Very truly yours,

Laurence S. Manhan

LSM:kjk

Enclosure

execuair
8749 REMMET AVENUE · P. O. BOX 1166 · CANOGA PARK, CALIFORNIA 91304, U. S. A. · (213) 341-0010

STATEMENT BY EXECUAIR CORPORATION

8749 Remmett Avenue
Canoga Park, California 91304
November 1, 1982

Execuair Corporation ("Execuair") requests this opportunity to respond to the statement submitted by Whittaker Controls ("Whittaker") dated August 18, 1982. The purpose of this response is to point out the half truths and false innuendos found in the Whittaker statement.

Execuair makes this statement in a meaningful sense with one hand tied behind its back. In the antitrust and unfair trade practice litigation that is presently pending between Execuair and Whittaker, the parties entered into a protective order which allows their respective attorneys to place under seal any information the attorney believes may contain a trade secret. Execuair has used this order only in the sense it was intended to be used and that is to protect legitimate trade secrets. Whittaker, on the other hand, has misused the protective order and in a wholesale manner has placed under seal almost the entirety of its discovery responses, including the depositions of its employees. Whittaker employs sophisticated counsel and knows that most Federal Judges will not undertake an examination of the propriety of trade secret designations for the sole purpose of allowing a party to make a responsive statement to this Committee.

Whittaker was aware of the predicament it would create for Execuair if it snatched out of overall context various parts of depositions taken of Execuair personnel to hype the statement it gave to this Committee. Whittaker knew that because of the manner in which Whittaker had misused the protective order, Execuair would be precluded from using the depositions of

Whittaker employees to respond to Whittaker's exagerated statements.

Execuair contends that it is impossible for Whittaker to justify the tremendous difference in price that Whittaker charges the United States Government for an identical part that is sold to commercial airlines at a lower price. If Whittaker really wants this Committee to know the truth behind this contention, have them unseal for the Comm[illegible] Joseph Stevens and Jack Sargent [illegible] facts behind these contentions w[illegible]

The quality control smok[illegible] out at the Committee is just that [illegible] Whittaker failed to tell the Committ[illegible] most of his staff have no degrees in engi[illegible]

Whittaker failed to tell the Committee that [illegible] is registered as a professional engineer by the State of California by way of a grandfather clause and not because he otherwise met the California requirements. Finally, Whittaker did not tell the Committee of the horror stories in respect to Whittaker quality control that were brought out during Mr. Larango's deposition. If Whittaker wants this Committee to know the truth in respect to its quality control performance it

---

[1] The deposition of Jack Sargent was taken on May 8, 1981, Mr. Sargent is the individual at Whittaker Controls who had the most contact with Whittaker Government customers. Mr. Joseph Stevens, the President of Whittaker Controls had his deposition taken on October 7, 1981.

would unseal for this Committee's use the deposition of Mr. Larango.[2] On the other hand, although it attempts to belittle Execuair's quality control procedures, Whittaker was unable to point to any error in quality in respect to Execuair parts manufactured under the FAA-PMA program. Execuair may lack a large corporation style organization chart for its quality control but it 100% inspects its parts before they are sent to its customers. Whittaker cannot say the same thing.

Execuair has consistently denied that it is guilty of committing any unfair trade practice or palming off in respect to Whittaker products. Whittaker consistently fails to come to terms with the fact that it could produce no admissible evidence in its law suit against Execuair and that judgment was entered against Whittaker in respect to all counts on July 30, 1981.[3]

In its statement, Whittaker states that the FAA has found that Execuair made certain misrepresentations in respect to the sale of five valves to Ozark Airlines.[4] What Whittaker did not tell the Committee, and what it could have quoted from Mr. Manhan's deposition, is that Execuair contested the findings of the FAA in this respect, has refused to pay any penalty and for all intent and purposes the FAA and the United States Attorney have let the matter drop.

---

[2] Mr. Frank Larango's deposition was taken on August 31, 1982.

[3] A copy of the Judgment is attached hereto as Exhibit "A." It should also be noted that Execuair stood ready then and now to contest Whittaker's inadmissable evidence had the Court thought it necessary.

[4] This material is Exhibit "L" to Whittaker's Statement. It should be noted that the FAA investigation was based on the Whittaker complaint filed in August of 1977.

Also, by cooperating with the Air Force Office of Special Investigation, Execuair has ascertained that certain of its customers such as Universal Aircraft have in fact in some limited instances sold or attempted to sell more surplus Whittaker parts to the airforce than were sold to them by Execuair.

Value of the Present FAA-PMA Program

Whittaker valves are used in numerous positions on present-day operating jet transport aircraft as well as military aircraft. For the most part they are not of new basic design and are not the subject of or capable of being Patented. For instance, the cross-feed fuel valve on the L-1011-500 is apparently the same valve that was developed for the B-52.

Nonetheless, aircraft manufacturers and engine manufacturers have a habit of only approving one manufacturer's valves to be included in their manufacturer's design certification procedures that are conducted with the FAA. Execuair knows that airlines, as well as Execuair itself, have asked Boeing and Pratt & Whitney to test Execuair valves so that all airlines could use Execuair as a second source without fear of warranty or FAA problems. The manufacturers have refused to test Execuair valves saying only that they were satisfied with the present manufacturer.

Therefore, if it were not for the FAA-PMA program, the airlines and U.S. Government would have no second source even for spare or replacement parts in respect to these valves. And, even here the FAA-PMA program out of necessity calls for such identicality that only a certain number of parts can reasonably be expected to become second sourced through the PMA program.

The Committee might ask itself why manufacturers such as Boeing and Pratt & Whitney refuse to test for second source purposes valves manufactured by Execuair or others to replace valves such as those manufactured by Whittaker which are neither overly complicated or subject to patent.

Execuair contends and it believes it has some facts to support the proposition that large manufacturers such as Whittaker find it necessary in order to get their valves approved by a manufacturer such as Boeing to offer their initial sale of valves to the manufacturer at prices which will not allow them to realize a profit. This is done with at least the tacit understanding that the aircraft manufacturer, such as Boeing, will not approve the valves of a second source manufacturer, such as Execuair, thereby allowing the original valve manufacturer to recover its profits from its sales of spares or replacement parts to the airlines and the Government. Execuair believes it is for this reason that Whittaker has been so upset with the fact that the present FAA-PMA program, combined with a well run and specialized surplus program,[5] has allowed Execuair so far to compete with Whittaker in the spare part and replacement part business in respect to Whittaker valves. It was the all-important loss of profits in this area that Execuair contends caused Whittaker to take the acts complained of in its pending antitrust-unfair competition lawsuit against Whittaker.

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[5] Execuair concentrates its surplus purchases almost exclusively on the purchase of Whittaker valves and parts, such as its purchase of the entire available inventory of a cancelled Whittaker distributor.

Conclusion

It is true that Execuair has not yet quantified its damages in its lawsuit against Whittaker. Yet Whittaker knows just as Execuair knows, that the acts of Whittaker about which Execuair complains caused Execuair to come within an eye's blink of going out of business. It was only by the tough position taken by Execuair management in rolling up its corporate sleeves and cutting its personnel to the bare minimum that allowed Execuair to survive and to slowly begin to grow again. Without the present FAA-PMA program, this would have been impossible.

Enter JS-6

I hereby attest and certify on 7-30-81
that the foregoing document is a full, true and correct
copy of the original on file in my office, and in my
legal custody
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Sandra Butler Deputy

FILED
JUL 30 1981
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY Deputy

ENTERED
JUL 30 1981
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WHITTAKER CORPORATION AND DYNASCIENCES CORPORATION,

Plaintiffs,

vs.

EXECUAIR CORPORATION, EMC MANUFACTURING CO., INC., and LAURENCE S. MANHAN,

Defendants.

CV 77-3261 CBM

JUDGMENT

The liability phase of this action was heard on July 14, 1981, before the Honorable Consuelo B. Marshall, United States District Judge.

This Court opened the proceedings by making a ruling on plaintiffs' previously filed written Offer of Proof ("Offer of Proof"). The Court ruled that the evidence itemized in plaintiffs' Offer of Proof was inadmissible and would be excluded as established in earlier Court rulings because it was either (1) evidence outside the time period for admissibility, or (2) evidence discovered in a companion case, Execuair Corporation v. Whittaker Corporation and Whittaker Controls, Civil Action No.

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EXHIBIT "A"

79-3171CBM, after the discovery cutoff in this action. Despite the Offer of Proof, the Court reaffirmed its earlier evidentiary rulings. Plaintiffs and defendants then stipulated as follows: (1) all parties reserve all rights to appeal, (2) all parties reserve all rights to a jury trial, and (3) defendants' evidentiary objections to plaintiffs' Offer of Proof are reserved for a future trial (if this action is appealed and remanded).

Plaintiffs then represented to the Court that, inasmuch as the evidence itemized in plaintiffs' Offer of Proof had been held inadmissible and excluded by the Court, plaintiffs had no further proof to offer that would independently establish liability; plaintiffs then rested.

Defendants' counsel then moved for judgment for defendants on all counts. The Court granted defendants motion.

Good cause appearing therefore:

1. IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, and that defendants Execuair Corporation, EMC Manufacturing Co., Inc., Laurence S. Manhan, Execuair Sales Corporation and Execuair Service Corporation shall have judgment entered in their favor on all counts of the complaint in this action and recover from plaintiffs their costs of action;

2. IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs and defendants shall not make any knowing misrepresentations regarding the nature or result of this proceeding and judgment.

DATED: JUL 29 1981

CONSUELO B. MARSHALL, Judge
United States District Court

EXHIBIT A